

## Memorandum 83-29

Subject: Study M-100 - Statute of Limitations for Felonies (Consultant's Study)

## BACKGROUND

The Commission was directed by the 1981 Legislature to study the statute of limitations for felonies and make recommendations to the Legislature on a priority basis.

Pursuant to this directive we retained a consultant, Professor Gerald F. Uelmen of Loyola Law School, to prepare a background study. The background study has been completed and distributed to the Commissioners and to interested persons for review.

The staff has sought to involve groups known to be concerned about the subject of this study in order to obtain their views by means of written communications, attendance at Commission meetings, or both. These groups include the Attorney General, California District Attorneys Association, State Public Defender, California Public Defenders Association, California Attorneys for Criminal Justice, American Civil Liberties Union, Judicial Council, and State Bar Criminal Law Section. In addition, the Commission's study has been publicized and comment invited through press releases.

## PROCEDURE ON STUDY

We hope to be able to follow a procedure on the felony limitations study that will enable us to submit a recommendation to the 1984 legislative session. Such a procedure would roughly follow this schedule:

May 6. At the Commission's May meeting in Los Angeles the consultant presents the background study. The Commission hears comments of interested persons present at the meeting, reviews written comments previously submitted, and makes initial policy decisions on the felony limitations study.

June 2-4. For the June meeting in San Francisco, the staff prepares a draft of a tentative recommendation to embody the Commission's initial policy decisions. At the meeting the Commission makes necessary revisions with the view to approving a tentative recommendation to distribute for comment. After the meeting the staff revises the draft and distributes it for interested persons to review over the summer.

September 22-24. At the September meeting in San Diego the Commission reviews comments received on the tentative recommendation and makes any necessary revisions in light of the comments.

November. For the November meeting (not yet scheduled) the staff prepares a draft of the final recommendation. After the Commission makes any necessary changes in the draft at the meeting, the staff prepares the recommendation for printing and submission to the Legislature. The bill should be ready for introduction early in the 1984 session.

This schedule may prove to be overly ambitious, but it is a schedule the staff believes we should attempt to adhere to if we are to fulfill the legislative mandate of production of a recommendation on a priority basis.

#### COMMENTS ON STUDY

We have received comments on the background study from the State Bar Criminal Law Section, which are attached as Exhibit 1. The comments are, briefly:

#### General Approach

The State Bar Section supports the logic and concept of the background study. They believe that the history of statutes of limitation should be considered in preparing a new draft, along with the actual purpose of a statute of limitations. An effort should be made to avoid the influence and pressures the Legislature has had to deal with over the last few years. The new draft should follow the logic expressed in the study.

#### Drafting Mechanics

The State Bar Section believes the specific draft offered by Professor Uelmen is too complex. In particular, a limitation period based on the penalty for the crime would not be simple to administer because law enforcement personnel would have to cross-refer to the penalty for the particular crime in order to tell what limitation period applies.

A simpler solution offered by the Section is a return to the old system of a one-year limitation period for misdemeanors, three years for felonies, and no limitation for homicides. These periods could be adjusted uniformly upward if necessary or desirable.

These specific observations appear to the staff to conflict with the State Bar Section's general approval of the logic of the background study.

#### Limitation Period for Serious Crimes

Professor Uelmen's draft provides a six-year limitation period for a crime punishable by imprisonment in state prison for nine years or more. Section (2)(a). The State Bar Section suggests that it be made clear that the reference to nine years is to a "base term."

This suggestion relates to the operation of the determinate sentencing law, which provides base terms plus enhancements. However, the base term is one of three selected by the judge--e.g., five years, seven years, or nine years--evidently the draft is intended to refer to the maximum base term. The staff is under the impression that the middle term of the three is nearly always selected by the judge, notwithstanding mitigating or aggravating factors.

#### Limitation Period for Sex Crimes

Professor Uelmen's draft requires that, in order to be subject to prosecution, a sex crime must be brought to the notice of public authority within six months after it was committed. Subdivision (4). There was "some opposition" to this provision from the State Bar Section. It is possible that the opposition is based on a misunderstanding, since the State Bar letter characterizes the provision as a "six month limitation period," when in fact it is a six-month complaint requirement.

Respectfully submitted,

Nathaniel Sterling  
Assistant Executive Secretary

EXHIBIT 1  
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April 22, 1983

Nathaniel Sterling, Assistant Executive Secretary  
 California Law Revision Commission  
 4000 Middlefield Road, Room D-2  
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RE: Study of Felony Limitation Statutes

Dear Mr. Sterling:

The Criminal Law Section of the State Bar, whose membership includes prosecution and defense counsel as well as academic and government attorneys who specialize in the area of criminal law, has reviewed the above-referenced study.

The Criminal Law Section supports the concept and the logic expressed in the report, but has some concerns regarding the proposed draft. The history of statutes of limitations should be considered when drafting the proposal. It is clear that we have a complex web of statutes at the present time. The proposed draft would still be too complex.

A limitations scheme should be simple and definitive, the proposed draft is neither. There are problems created by basing the limitation period on the sentence for a crime.

Nathaniel Sterling  
April 22, 1983  
Page Two

In one respect, it serves a good purpose because the term for more serious crimes provides a longer limitation period. However, keying the statute to the penalty means one would have to constantly cross-reference by checking the crime and its penalty before determining the statute of limitations. The Section is concerned that one of the purposes of the statute is to assist law enforcement personnel and to this end, it would be best to avoid the necessity of having to cross-reference the codes to determine the limitation period.

One specific suggestion regarding the proposed draft is that in subdivision (2), where there is a reference to the number of years in state prison, that reference should be clarified as the "base term."

One suggestion is to go back to the old system of a 3-year limitation period for all felonies except homicides, for which there would be no limitation, and a 1-year period for misdemeanors. Clearly, the number of years could be increased across the board.

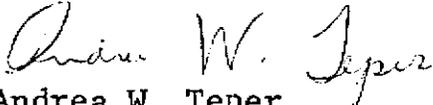
There was some opposition to subdivision (4), which provides for the six month limitation period for sex-related crimes.

The Section suggests that there should be some re-thinking along the lines of the actual purpose of a statute of limitations and try to avoid the influence and pressures that the Legislature has had to deal with over the last few years.

A new draft should follow the logic as expressed in the study.

The views expressed herein are on behalf of the Section, rather than the Bar as a whole, as the Bar's Board of Governors has not reviewed nor taken a position regarding the study on statutes of limitations for felonies.

Most sincerely,

  
Andrea W. Teper  
Staff Attorney

AWT/tlc

cc: David R. Disco, Chair, Criminal Law Section

MAKING SENSE OUT OF  
CALIFORNIA'S CRIMINAL  
STATUTE OF LIMITATIONS\*

\*This study was prepared for the California Law Revision Commission by Professor Gerald F. Uelman. No part of this study may be published without prior written consent of the Commission.

The Commission assumes no responsibility for any statement made in this study, and no statement in this study is to be attributed to the Commission. The Commission's action will be reflected in its own recommendation which will be separate and distinct from this study. The Commission should not be considered as having made a recommendation on a particular subject until the final recommendation of the Commission on that subject has been submitted to the Legislature.

Copies of this study are furnished to interested persons solely for the purpose of giving the commission the benefit of the views of such persons, and the study should not be used for any other purpose at this time.

MAKING SENSE OUT OF  
CALIFORNIA'S CRIMINAL  
STATUTE OF LIMITATIONS

By Gerald F. Uelmen\*

"It is the finding of the Legislature that since its enactment in 1872, California's basic three-year statute of limitations for felonies has been subjected to piecemeal amendment, with no comprehensive examination of the underlying rationale for the period of limitation, nor its continued suitability as applied to specific crimes or categories of crimes. In the estimation of the Legislature it is therefore desirable for the California Law Revision Commission, on a priority basis, to undertake an indepth study of the rationales for the statutes of limitations for various felonies and the justification for the revision of the period of limitations for specific crimes or categories of crime, and to make recommendations to the Legislature based on the study."

Stats. Calif. 1981, c.909, §3.

TABLE OF CONTENTS

	Page
I. INTRODUCTION . . . . .	1
II. LEGISLATIVE HISTORY OF THE CALIFORNIA STATUTE OF LIMITATIONS . . . . .	3
(a) No Limitation . . . . .	4
(b) Three Year Limitation . . . . .	5
(c) Three Years After Discovery . . . . .	6
(d) Six Year Limitation . . . . .	7
(e) One Year Limitation for Misdemeanors . . . . .	10
(f) Tolling of Statute of Limitations . . . . .	11
(g) Commencement of Prosecution . . . . .	12
III. FACTORS SUPPORTING A SHORT PERIOD OF LIMITATIONS . . . . .	15
(a) The Staleness Factor . . . . .	15
(b) The Motivation Factor . . . . .	21
(c) The Repose Factor . . . . .	25
IV. FACTORS SUPPORTING A LONG PERIOD OF LIMITATIONS . . . . .	27
(a) The Concealment Factor . . . . .	27
(b) The Investigation Factor . . . . .	31
(c) The Seriousness Factor . . . . .	33
V. MODERN TRENDS IN OTHER JURISDICTIONS . . . . .	36
VI. STRIKING A BALANCE: CATEGORIZING THE SERIOUSNESS FACTOR . . . . .	38
(a) No Limitation . . . . .	41
(b) Six Year Limitation . . . . .	43
VII. ACCOMODATING THE OTHER FACTORS . . . . .	45
(a) Accomodating the Concealment Factor . . . . .	45
(b) Accomodating the Motivation/Investigation Factor . . . . .	49
(c) Accomodating the Staleness Factor . . . . .	49
VIII. COMMENCEMENT OF PROSECUTIONS . . . . .	54
IX. TOLLING PROVISIONS . . . . .	57
X. RETROACTIVITY OF CHANGES . . . . .	59
FOOTNOTES . . . . .	62
APPENDIX I: Current California Statutes of Limitations . . . . .	68
APPENDIX II: Criminal Statutes of Limitations in the United States . . . . .	69
APPENDIX III: Survey of Prosecutors, Defense Lawyers and Judges . . . . .	70
APPENDIX IV: Proposed Draft . . . . .	71

I.

INTRODUCTION

The purpose of this report is to assist the California Law Revision Commission in the monumental task of defining the appropriate considerations which justify the duration of a statute of limitations for specific crimes or categories of crime. The Legislature's assessment of the inadequacy of the present law is certainly warranted. The current statutes, summarized in Appendix I, resemble a patch-work crazy-quilt, riddled with inconsistencies. The legislative mandate goes beyond simply eliminating these inconsistencies, however. A comprehensive framework is needed to appropriately respond to the pattern of ad hoc legislation which currently prevails in Sacramento. No less than eleven legislative enactments have modified the felony statute of limitations since 1969. Many of these enactments were responses to widely publicized cases in which the statute of limitations was successfully asserted as a bar to prosecution. While responding to public outcry is certainly a legitimate legislative function, the response should be consistent with rational general principles. To the extent that legislation is perceived as arbitrary "knee-jerk" reactions, it loses its moral force.

After reviewing the legislative history of the California criminal statute of limitations from its 1851 origin to the present day, we will analyze each of the factors which might be offered to justify a short limitations period: the staleness factor, the motivation factor and the repose factor. This will be followed by an analysis of the factors offered to justify a long limitations period, or even no limitations period at all: the concealment factor, the investigation factor and the seriousness factor. Our attempt to relate these factors to particular crimes or categories of crime will be aided by survey responses obtained from California prosecutors, defense lawyers, and Superior Court judges. The respondents were asked to relate specific crimes from the list appearing in Appendix III to the various factors offered to justify shorter or longer statutory periods, and to evaluate whether the current limitations period for each of these crimes is too short or too long. The responses add a deep dimension of practical experience to our task. The 26 prosecutors responding had an average of 12 years experience as prosecutors. The 25 defense attorneys responding included 13 private defense lawyers, with an average of 18 years experience, and 12 public defenders, with an average of 12 years experience. The 7 judges responding had averaged 9 years on the bench.

After surveying the upward trend of statutes of limitations in other jurisdictions, we will turn to the task of identifying the inconsistencies in the current California statutes, and suggest a framework for future legislation based in large part on the recommendations of the Model Penal Code.

II.

LEGISLATIVE HISTORY OF THE CALIFORNIA

STATUTE OF LIMITATIONS

The basic structure of California's statute of limitations was established by the second session of the state legislature in 1851 with a relatively simple enactment:

"§ 96. There shall be no limitation of time within which a prosecution for murder must be commenced. It may be commenced at any time after the death of the person killed.

§ 97. An indictment for any other felony than murder must be found within three years after its commission.

§ 98. An indictment for any misdemeanor must be found within one year after its commission.

§ 99. If when the offense is committed the defendant be out of the State, the indictment may be found within the term herein limited after his coming within the State, and no time during which defendant is not an inhabitant of, or usually resident within the State, shall be a part of the limitation.

§ 100. An indictment is found within the meaning of this Title, when it is duly presented by the Grand Jury in open court, and there received and filed."<sup>1</sup>

These provisions were carried over intact into the Penal Code enacted in 1872, where they appeared as Sections 799-803. The subsequent history of each of these sections of the Penal Code certainly substantiates the legislative finding that "piecemeal amendment" has occurred.

(a) No Limitation. Penal Code § 799, originating with § 96 of the 1851 statute, still enumerates the offenses for which no limitation of time is imposed for commencement of prosecution. The offenses of embezzlement of public moneys and falsification of public records were added in 1891.<sup>2</sup> At that time, embezzlement of public moneys and falsification of public records were felonies punishable by 1 to 10 years in the state prison, as well as by disqualification from holding any state office.<sup>3</sup> Under the determinate sentencing law adopted in 1976, the punishment may vary depending upon whether an embezzlement of public money is prosecuted under Penal Code § 424 (two, three or four years imprisonment) or Penal Code § 514 (16 months, two or three years).<sup>4</sup> Falsification of public records is a "wobbler" punishable by either one year in the county jail or 16 months, two or three years in the state prison under either Penal Code § 473 or Government Code § 6201. If the offense is committed by the official custodian of the record, Government Code § 6200 sets a four year maximum.

After the various forms of common law theft offenses were consolidated by Penal Code § 484,<sup>5</sup> the question arose whether a theft of public funds by false pretenses would also be subject to Penal Code § 799, thus prosecutable at any time. In People v. Darling,<sup>6</sup> the Court held that § 799 is strictly limited to thefts in which the traditional elements of embezzlement are present, involving a breach of a fiduciary trust.

The crime of kidnapping in violation of Penal Code § 209 was added to § 799 in 1970.<sup>7</sup> Penal Code § 209 applies to kidnapping for ransom, extortion, or robbery. In 1970, it was punishable by death or life without possibility of parole if the victim suffered bodily harm, and life with possibility of parole in other cases.<sup>8</sup> In 1977, § 209 was amended to eliminate the death penalty.<sup>9</sup>

(b) Three Year Limitation. Penal Code § 800, originating with § 97 of the 1851 statute, established a limitation of three years after commission for all felonies not enumerated in § 799. The section now includes two additional categories of exceptions which have grown with increased frequency in recent years: felonies for which the three year limitations period commences upon discovery of the crime, rather than its commission; and felonies for which a limitation period of six years after commission is established. The residual limitations period, for all offenses not enumerated in § 799 and not named in either category of exceptions, remains three years after commission of the crime.

(c) Three Years After Discovery. The concept of having the statute of limitations commence upon discovery of the crime was first introduced into the California Penal Code in 1969. Senate Bill No. 1154, introduced by then Senator George Deukmejian, amended Penal Code § 800 to provide that "an indictment for grand theft shall be found, an information filed, or case certified to the superior court within three years after its discovery."<sup>10</sup> As originally introduced, the proposal was limited to grand theft by false pretenses, but later amendment extended it to include all forms of grand theft.<sup>11</sup> Once the concept was in place, it was frequently utilized in subsequent legislation adding the following offenses to its provisions:

1. Forgery, added in 1970.<sup>12</sup>
2. Voluntary manslaughter and involuntary manslaughter, added in 1971.<sup>13</sup>
3. Fraudulent claims against the government, perjury, filing false affidavits, and conflict of interest by public officials in violation of Government Code § 1090, as well as conflict of interest by a public administrator, all added in 1972 by the same legislative enactment which made a violation of Section 27443 of the Government Code, which describes the offense of conflict of interest by a public administrator, a felony/misdemeanor "wobbler," rather than a straight misdemeanor.<sup>14</sup> This legislation was introduced by Assemblyman Beverly in the wake of a widely publicized scandal involving sale of estate property by the public administrator of Los Angeles County.<sup>15</sup>

4. Offering false evidence or preparing false evidence, in violation of Penal Code sections 132 or 134, added in 1975.<sup>16</sup> This addition was part of a bill which specified the use of false evidence as grounds for a writ of habeas corpus under Penal Code § 1473.<sup>17</sup> It was apparently motivated by a widely publicized case in which an innocent man had been convicted by the use of a forged fingerprint. Criminal prosecution of the officer involved had been barred by the statute of limitations.<sup>18</sup>

5. Fraud in the offer, purchase or sale of securities in violation of Corporations Code § 25541, and other violations of the Corporate Securities Law punishable under Corporations Code § 25540, added in 1978.<sup>19</sup> The maximum penalty for violations of § 25540 was reduced from 10 years to 3 years in 1976, with a "wobbler" misdemeanor alternative remaining intact.<sup>20</sup>

6. Felony welfare fraud in violation of Section 11483 of the Welfare and Institutions Code, added in 1981.<sup>21</sup>

7. Felony Medi-Cal fraud in violation of Section 14107 of the Welfare and Institutions Code, added in 1982.<sup>22</sup>

(d) Six Year Limitation. The enumeration of certain offenses subject to a limitation of six years after commission began in 1941, when Penal Code § 800 was amended to provide that a prosecution for the acceptance of a bribe by a public official or a public employee, a felony, must commence within six years after commission of the offense.<sup>23</sup> At the time of this enactment, four different sections of the Penal Code proscribed the acceptance of

bribes by public officials as felonies: § 68, applicable to executive officers; § 86, applicable to legislators; § 93, applicable to judicial officers; and § 165, applicable to city and county officials. With the exception of § 93, these offenses were all punishable by 14 years imprisonment and forfeiture of office under the 1872 Code. Judicial officers, for some unexplained reason, faced a maximum penalty of ten years, rather than fourteen. The punishment is currently set at two, three and four years for all four offenses under the Determinate Sentencing Law.<sup>24</sup> There are related offenses involving acceptance of "emolument, gratuity or reward" which carry misdemeanor penalties, and are thus excluded from the applicability of the six year limitation of § 800. They would be governed by the one year limitation of § 801.<sup>25</sup>

In 1981, three different bills amending Penal Code §800 were enacted by the legislature, adding a variety of rape related offenses to the six-year limitations period. One year earlier, the section had been amended to provide a five year limitations period for violations of Section 288 of the Penal Code, which punishes lewd acts with a child under age 14 by a prison term of three, six or eight years.<sup>26</sup> In 1980, widespread publicity was given to the case of the "College Terrace" rapist in Palo Alto, California. Melvin Carter confessed to seventy rapes in six counties over a ten year period. Many of the rapes were within the statute of limitations, and Carter eventually pled guilty to thirteen counts of rape and is now serving a twenty-five year

prison sentence. The victim of a rape which occurred more than three years earlier strenuously objected that her case could not be prosecuted.<sup>27</sup>

On January 1, Assemblyman Byron D. Sher, who represents Palo Alto, introduced Assembly Bill 30, which would simply have added rape in violation of Penal Code Section 261 to the five year category established for § 288 one year earlier. By subsequent amendment, the period for both offenses was extended to six years, and the bill was "double joined" with two Senate Bills adding Penal Code Sections 264.1, 289, subdivisions (c), (d) and (f) of Section 286, and subdivisions (c), (d) and (f) of Section 288a to the six year limitations period.<sup>28</sup>

These Penal Code Sections establish the following offenses and penalties:

- § 261 - Rape: three, six or eight years.
- § 264.1 - Rape Acting in Concert: five, seven or nine years.
- § 286(c) - Sodomy by force or with person under 14: three, six or eight years.
- § 286(d) - Sodomy Acting in Concert: five, seven or nine years.
- § 286(f) - Sodomy with Unconscious Victim: up to one year in county jail or sixteen months, two or three years.
- § 288a(c) - Oral Copulation by force or with persons under 14: three, six or eight years.

§ 288a(d) - Oral Copulation Acting in Concert: five, seven or nine years.

§ 288a(f) - Oral Copulation with Unconscious Victim: up to one year in county jail or sixteen months, two or three years.

§ 289 - Rape by Foreign Object: three, six or eight years. In 1981, § 289 was amended by adding a new subsection (b), which defines a separate offense where the victim is incapable, through lunacy or other unsoundness of mind, of giving legal consent. This offense is a felony/misdemeanor "wobbler," punishable by a maximum of three years imprisonment.<sup>29</sup>

(e) One Year Limitation for Misdemeanors. The one year statute of limitations for misdemeanors first created in § 98 of the 1851 statute remains intact in § 801 of the present Penal Code. Some confusion as to the appropriate statute of limitations was created by the category of crimes known as "wobblers," which can be punished as either a misdemeanor or a felony, depending on the discretion of the judge. Penal Code § 17(b)(4) and (5) provides that such offenses are misdemeanors "for all purposes" when the complaint specifies that the offense is a misdemeanor or when the magistrate determines that it is a misdemeanor at or before the preliminary hearing. Relying upon this language, the Court in Keener v. Municipal Court of Alameda County<sup>30</sup> held that prosecution was barred by the statute of

limitations where a charge of battery on a police officer, filed as a felony, was reduced to a misdemeanor at the preliminary hearing, and the charge had been filed more than one year after its commission. One year later, the legislature changed this result by amending § 801 to provide:

"(b) For an offense for which a misdemeanor complaint may be filed or that may be tried as a misdemeanor, pursuant to paragraphs (4) and (5) of subdivision (b) of Section 17, respectively, a complaint shall be filed within the time specified in Section 800 for such offense."30

(f) Tolling of Statute of Limitations. Section 99 of the original Statute of Limitations enacted in 1851 did not clearly toll the statute for any period of absence from the state. It permitted tolling if the offense was committed while the defendant was outside the state. Then, as now, those who were outside the state at the time a crime was committed could be prosecuted in California under the circumstances delineated in Penal Code § 27.32 Section 99 also excluded from the limitation period any time the defendant was not "an inhabitant of, or usually resident within the state." While it might be debated whether every "absence" would be excluded by this language, any ambiguity was resolved by a 1951 amendment to Penal Code § 802, which now provides:

"no time during which the defendant is not within this State, is a part of any limitation of the time for commencing criminal action."33

California courts have held that facts showing the defendant's absence from the state must be alleged in the accusatory pleading to avoid a dismissal if a period in excess of that allowed by the statute of limitations has elapsed since the offense was committed.<sup>34</sup>

(g) Commencement of Prosecution. At the time the original statute of limitations was adopted in 1851, all prosecutions were initiated by indictment. Therefore, each section specified that "an indictment . . . must be found" within the limitations period. Section 100 provided that an indictment was "found" when it was presented by the Grand Jury in open court, received and filed. That provision still appears as Penal Code § 803. In 1880, when the Penal Code was amended to permit prosecution by information,<sup>35</sup> each section of the statute of limitations was amended to provide that an indictment must be found "or an information filed" within the limitations period.<sup>36</sup> In 1935, a statute was enacted permitting a defendant to enter a plea of guilty or nolo contendere to a felony complaint in the municipal court, whereupon the magistrate would "certify the case" to the Superior Court for sentencing.<sup>37</sup> In such a case, neither an indictment or an information would ever be filed. To encompass this possibility, the felony statute of limitations was amended to add "or a case certified to the superior court" to the alternatives for commencement of prosecution.<sup>38</sup> Similarly, the 1933 provision for initiating a misdemeanor prosecution by "complaint" necessitated an amendment of the misdemeanor statute of limitations to provide for that alternative to initiate prosecution.<sup>39</sup>

Since a pleading in Superior Court was necessary to commence prosecution of felonies for purposes of the statute of limitations, prosecutors frequently resorted to the use of grand jury indictments when the statute of limitations was dangerously close, and the delays necessitated by a preliminary hearing created the risk that the statutory period might run before an information was filed in superior court. Thus, a crisis was created by the decision of the California Supreme Court in Hawkins v. Superior Court.<sup>40</sup> Relying on the equal protection clause of the California constitution, the Court held that a defendant indicted by the Grand Jury has a right to a post-indictment preliminary hearing before the indictment is filed. The legislature responded to this crisis by creating a bifurcation of the felony statute of limitations in Penal Code § 800. The alternative which is currently in effect provides that "an indictment shall be found, or an arrest warrant issued by the municipal or, where appropriate, the justice court" within the limitations period.<sup>41</sup> A new section, Penal Code § 802.5, was also enacted to provide:

"The time limitations provided in this chapter for the commencement of a criminal action shall be tolled upon the issuance of an arrest warrant or the finding of an indictment, and no time during which a criminal action is pending is a part of any limitation of time for recommencing that criminal action in the event of a prior dismissal of that action, subject to the provisions of Section 1387."<sup>42</sup>

Another alternative version, which reverts to the previous requirement that prosecution commences when an indictment is found, an information filed, or a case certified to the superior court, was also enacted, with the proviso that it will take effect when:

"a decision of a court of appeals or of the California Supreme Court becomes final, or an amendment to the California Constitution takes effect, whichever occurs first, which decision or amendment provides that a person charged by indictment with a felony is not entitled to a preliminary hearing. . . ."43

Proposals to amend the Constitution to overrule Hawkins have not met with any success in the legislature, but efforts have been reported to accomplish such a constitutional amendment by initiative.<sup>44</sup>

### III.

#### FACTORS SUPPORTING

#### A SHORT PERIOD OF LIMITATIONS

Three factors, frequently cited in cases and legal literature as justifications for the statute of limitations in criminal cases, would support a short period of limitations when they are applicable, as opposed to a long period or no limitation at all. These factors will be characterized as the staleness factor, the motivation factor, and the repose factor.

(a) The Staleness Factor. The statute of limitations is often viewed as a means of protecting an accused both from having to face charges based on evidence which may be unreliable, and from losing access to the evidentiary means to defend against an accusation of crime.

"With the passage of time memory becomes less reliable, witnesses may die or become otherwise unavailable; physical evidence becomes more difficult to obtain, more difficult to identify and more likely to become contaminated."<sup>45</sup>

The statute of limitations may not be the only protection available against these risks. In recent years, the constitutional right to due process of law has occasionally been utilized by the Courts to grant relief to a defendant where delays in the investigation or prosecution of the case have prejudiced his ability to defend himself, or where the prosecution was responsible for the destruction or loss of vital evidence.

In United States v. Marion,<sup>46</sup> the U.S. Supreme Court rejected a claim that the Sixth Amendment right to speedy trial had any application to delays prior to the institution of formal charges, noting the traditional role of the statute of limitations in this context:

The law has provided other mechanisms to guard against possible as distinguished from actual prejudice resulting from the passage of time between crime and arrest or charge. As we said in United States v. Ewell, [383 U.S. 116] at 122, "the applicable statute of limitations . . . is the primary guarantee against bringing overly stale criminal charges." Such statutes represent legislative assessments of relative interests of the State and the defendant in administering and receiving justice; they "are made for the repose of society and the protection of those who may [during the limitation] . . . have lost their means of defence." Public Schools v. Walker, 9 Wall 282 (1870). These statutes provide predictability by specifying a time limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced. As this Court observed in Toussie v. United States, 397 U.S. 112, 114-115 (1970): "The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity." There is thus no need to press the Sixth Amendment into service to guard against the mere possibility that pre-accusation delays will prejudice the defense in a criminal case since statutes of limitation already perform that function.<sup>47</sup>

The Court left open the possibility, however, that if delay caused substantial prejudice to a defendant's right to a fair trial and the delay was an intentional device to gain tactical advantage for the prosecution, the due process clause might

require dismissal.<sup>48</sup> Six years later, in United States v. Lovasco,<sup>49</sup> the Court made it clear that proof of actual prejudice was a necessary element of a due process claim but would not in itself justify relief without considering the reasons for the delay. The Court offered little guidance, however, as to what reasons for delay would be unacceptable:

Indeed, in the intervening years so few defendants have established that they were prejudiced by delay that neither this Court nor any lower court has had a sustained opportunity to consider the constitutional significance of various reasons for delay. We therefore leave to the lower courts, in the first instance, the task of applying the settled principles of due process that we have discussed to the particular circumstances of individual cases.<sup>50</sup>

Where evidence essential to the defense was lost or destroyed by the state, due process may also require dismissal of charges. In People v. Hitch,<sup>51</sup> the court held that the state has a duty to preserve material evidence and take reasonable measures to ensure its adequate preservation. This rationale has been applied to negligent loss of evidence as well as intentional,<sup>52</sup> but it still only protects the defendant where the loss of evidence was attributable to state authorities. Thus, the concept of due process cannot be viewed as an adequate substitute for the statute of limitations in meeting the concerns embodied in the staleness factor.

The staleness factor may be difficult to relate to specific offenses, however. The degree of risk will be determined by the kind of evidence, rather than the nature of the crime. The survey undertaken in this study attempted to ascertain whether certain types of crimes are more frequently proven by evidence which becomes less reliable with the passage of time, or involve

a greater risk that exculpatory evidence may be lost with the passage of time. The respondents were asked to select up to six crimes from a list of 24 which present the greatest risk of less reliable evidence or loss of exculpatory evidence. (See Appendix III for a complete list of the crimes included.) The results were remarkably consistent among judges, prosecutors and defense lawyers. With respect to evidence becoming less reliable, the crimes most frequently selected appear in Table 1.

TABLE 1

<u>CRIMES</u>	<u>PROSECUTORS (%)</u>	<u>DEFENSE LAWYERS (%)</u>	<u>JUDGES (%)</u>
1. Child Molesting	80	68	84
2. Rape	48	84	100
3. Robbery	48	56	70
4. Sale of Narcotics	28	52	42
5. Conspiracy	32	48	14

---

With the exception of conspiracy, which is most frequently proven through the testimony of co-conspirators, and child molesting, where the age of the victim presents particular problems of reliability, the crimes on this list are those in which an eye witness identification is crucial to the prosecution's case. The effect of the passage of time on the reliability of eye witness identification has been well documented in recent studies. Some research suggests that the passage of time assumes less significance as more time passes, since loss of memory is most acute in the period immediately following the event, while long term memory loss is a more gradual process.<sup>53</sup> Where an extremely long

period of time elapses between the commission of a crime and an identification of the perpetrator by the victim, the admissibility of the identification itself can be challenged on due process grounds. In Neil v. Biggers,<sup>54</sup> the court included "the length of time between the crime and the confrontation" among the factors to be considered in assessing the reliability of an identification procedure. Whether passage of time alone would justify suppression of identification testimony is a question seldom addressed by the Courts, however. In United States v. Walus,<sup>55</sup> the government sought to revoke the defendant's citizenship on the grounds he concealed his role in prison camp atrocities as a member of the German Gestapo in World War II. He was identified from photographs thirty-five years after the events took place. The court noted:

The long time span between the incidents and the viewings of this exhibit in the mid-1970's would itself require scrutiny of the identifications, even if they were made under "laboratory conditions."<sup>56</sup>

As already noted, however, due process principles cannot provide the same degree of protection that the statute of limitations provides against the risk of unreliable identifications long after the event.

With respect to the loss of exculpatory evidence, prosecutors tended to identify the same crimes as for evidence becoming unreliable, but defense lawyers placed some different crimes high on the list. The results appear in Table 2.

TABLE 2

	<u>CRIME</u>	<u>PROSECUTORS</u> (%)	<u>DEFENSE</u> <u>LAWYERS</u> (%)	<u>JUDGES</u> (%)
1.	Rape	48	68	70
2.	Child Molesting	60	40	28
3.	Robbery	48	44	56
4.	Murder	36	44	42
5.	Burglary	20	44	14
6.	Sale of Narcotics	32	36	28
7.	Conspiracy	20	36	28

---

While it is difficult to identify common elements to these offenses, three possibilities come to mind, and all were mentioned in questionnaire responses with some frequency by defense lawyers. First, just as prosecution of many of these crimes depends on eye witness identification, the defense may rely upon evidence of identification of another person as the perpetrator, which is equally affected by the passage of time. Second, the defense frequently offered to many of these crimes is "alibi," that the accused was at another location at the time of the crime. The passage of time makes alibi witnesses more difficult to locate and less certain regarding the specific times which may be crucial. Third, some of these crimes, especially murder, frequently require the presentation of evidence regarding the defendant's state of mind at the time of their commission, either as evidence of "diminished capacity" or as part of an insanity defense. The testimony of psychiatrists and other experts becomes less credible when they examined the defendant long after the events took place.

(b) The Motivation Factor. The Statute of Limitations may be viewed as a "deadline" to motivate efficient police work and insure against bureaucratic delays in investigating crime. Viewed in this light, the statute imposes a "priority" upon police and prosecutors, to insure the prompt investigation of crimes which have a shorter limitations period. It has been suggested that this motivation is unnecessary, since police and prosecutors are so overburdened and subjected to such public pressure already that they are compelled to "prioritize" and give prompt attention to those crimes the public is most concerned about.<sup>57</sup> A recent study of general police investigative techniques lends corroboration to the view that the statute of limitations may be a negligible factor in motivating their investigative activity.<sup>58</sup> An intensive study of the Kansas City, Missouri Police Department undertaken by Rand Corporation researchers ascertained what percentage of all reported crimes were actually worked on by detectives during a six month period. The results, shown in Table 3, present a graphic picture of police investigative priorities.<sup>59</sup>

TABLE 3

PERCENTAGE OF REPORTED CASES  
WORKED ON BY DETECTIVES

<u>Type of Incident</u>	<u>Percent</u>
Homicide	100.0
Rape	100.0
Suicide	100.0
Forgery/counterfeit	90.4
Kidnapping	73.3
Arson	70.4
Auto theft	65.5
Aggravated assault	64.4
Robbery	62.6
Fraud/embezzlement	59.6
Felony sex crimes	59.0
Common assault	41.8
Nonresidential burglary	36.3
Dead body	35.7
Residential burglary	30.0
Larceny	18.4
Vandalism	6.8
Lost property	0.9
<u>All above types together</u>	<u>32.4</u>

The researchers found that investigators chose the cases to work on "by considering both the seriousness of the crime and whether sufficient leads are present to indicate that the chances of clearing the crime are high."<sup>60</sup> Thus, a majority of the cases worked on were cleared by arrest. The vast majority of cases that detectives worked on were handled in the course of a single

day. Only a few types of crimes involved sustained investigative activity: homicide, rape, safe burglary, commercial robbery and forgery/counterfeiting. It is interesting to note that Missouri's statute of limitations is very similar to California's, with a general 3 year period for felonies, 1 year for misdemeanors, and no limitation for murder and aggravated robberies.<sup>61</sup> The conclusions of the Rand researchers strongly suggest that neither an increase or reduction in the statute of limitations would significantly affect the allocation of general investigative resources by the police:

"The investigator's daily routine cannot be characterized as devoted primarily to piecing together clues for the purpose of solving crimes. For the most part he operates in a reactive mode, responding to externally generated events that require an action on his part. Administrative activities, service to the public, and other work not related to cases consumes nearly half of his time.

A large number of incidents come to his attention, but many of them receive little or no work and simply sit on his desk constituting part of his caseload. If an arrest has already been made, or it is apparent from the crime report that a limited amount of work will result in an arrest, then the case is pursued and most of the work involves post-arrest processing, writing reports, documenting evidence, and the like. A small number of cases are pursued simply because of their seriousness or importance, but it does not appear that the chances of clearance are enhanced in proportion to the amount of work."<sup>62</sup>

The motivation factor may have some significance, however, with respect to specialized investigative activities.

In the survey of prosecutors, defense lawyers and judges undertaken in connection with this study, the respondents were asked to identify up to six crimes from the list of 24 in

Appendix III which "are most susceptible to bureaucratic delays in investigative activity." The crimes most frequently identified appear in Table 4.

TABLE 4

<u>CRIME</u>	<u>PROSECUTORS (%)</u>	<u>DEFENSE LAWYERS (%)</u>	<u>JUDGES (%)</u>
1. Corporate Securities Fraud	64	44	14
2. Conflict of Interest	36	48	28
3. Embezzlement of Public Funds	40	36	14
4. Fraudulent Claims Against Government	36	32	14
5. Payment of Bribe	24	36	56
6. Receipt of Bribe	28	32	70
7. Grand Theft	28	24	0

---

It is interesting to note that the list is composed of what are generally perceived to be "white collar" crimes. These crimes are frequently investigated by highly specialized investigators assigned to special agencies or task forces. The list also includes many of the offenses where the Statute of Limitations commences upon discovery of the crime, because the crime is often concealed. The "Concealment Factor" will be discussed at greater length, but the "Motivation Factor" may lead us to conclude that suspension of the statute of limitations until the crime is discovered may be a better way to deal with concealed crimes than a longer statute of limitations. This has particular significance with respect to Embezzlement of Public Funds and

Falsification of Public Records, both of which are presently subject to no limitation, and Receipt of a Bribe, currently subject to the six year limitation.

(c) The Repose Factor. An eloquent statement of the repose factor was contained in a response to the survey questionnaire from a California public defender:

"After some period of time, victim, defendant and society adjust to the commission of a crime. I don't want to bear enmity beyond that time, nor to live in a society that bears enmity beyond that time, sufficient to penalize the defendant. Furthermore, today's problems are sufficient -- I don't have the energy to attend to the things that plagued me years ago."

The extent of one's agreement with this sentiment may be strongly affected by how one views the purpose of the criminal law -- deterrence, incapacitation, rehabilitation or retribution. But every one of these views leaves room for a repose factor:

"If the person refrains from further criminal activity, the likelihood increases with the passage of time that he has reformed, diminishing pro tanto the necessity for imposition of the criminal sanction. If he has repeated his criminal behavior, he can be prosecuted for recent offenses committed within the period of limitations.

As time goes by, the retributive impulse which may have existed in the community is likely to yield place to a sense of compassion for the person prosecuted for an offense long forgotten."63

The question of how long a period lapses before punishment is no longer appropriate may be answered differently for every crime. To a large extent, it will be answered consistently with one's response to the seriousness factor, discussed infra, in which an attempt is made to identify crimes for which no repose should be offered. Ultimately, however, society makes a judgment of how long we should "bear enmity" for a crime by setting the term of

years for which that offense should be punished. It would be quite inconsistent to say, simply on the basis of the repose factor, that prosecution for a crime should be barred three years after commission, when those who are apprehended at the time of commission are regularly sentenced to ten years in prison. Thus, it was probably not just coincidence that the one year statute of limitations for misdemeanors is the same as the one year maximum sentence for misdemeanors in California.<sup>64</sup> The maximum penalty for felonies varies widely, from a maximum of three years where an offense is simply declared to be a felony,<sup>65</sup> to a maximum of death or life without possibility of parole for first degree murder when special circumstances are alleged or proven.<sup>66</sup> A statute of limitations shorter than the maximum penalty might be justified by the staleness factor or the motivation factor, but it cannot be justified by the repose factor. The appropriateness of a statutory period which exceeds the maximum penalty is considered in connection with the seriousness factor.

IV.

FACTORS SUPPORTING

A LONG PERIOD OF LIMITATIONS

Three justifications have been offered in cases and legal literature for a longer statute of limitations, or in some cases no statute of limitations at all. These factors will be characterized as the concealment factor, the investigation factor and the seriousness factor.

(a) The Concealment Factor. The very nature of certain crimes makes their detection especially difficult. A longer statute of limitations might be justified for such crimes to insure that the perpetrators do not escape punishment simply by successfully concealing their criminal activity. This is the apparent motivation for exempting embezzlement of public funds and falsification of public records in Section 799 of the California Penal Code. As noted by the court in People v. Darling:<sup>67</sup>

"An obvious reason for excepting from a statute of limitations the offense of embezzlement of public funds as distinguished from other forms of theft thereof is that ordinarily the situation giving rise to the embezzler's theft protects him in keeping his crime a secret. This conclusion is corroborated by the fact that the offense of falsifying public records, which arises out of a comparable situation retarding detection, also is excepted from the subject statute. No reason appears for having enlarged the scope of these exceptions to encompass modes of stealing public funds other than that included within the common law offense of embezzlement."<sup>68</sup>

This reasoning is "obvious," however, only where the choice is limited to whether the statute of limitations should apply or not apply at all. If a third alternative is considered, suspending

the statute of limitations until the crime is discovered, a different treatment of the crimes of embezzlement of public funds and falsification of public records may be called for. In 1891, the legislature had not yet achieved the sophistication to create this third choice. As we have seen, the concept of suspending the statute of limitations until discovery of the crime was not utilized by the legislature until 1969.

The survey requested respondents to identify up to six crimes which are most likely to be concealed. The crimes most frequently listed appear in Table 5.

TABLE 5

<u>CRIME</u>	<u>PROSECUTORS(%)</u>	<u>DEFENSE LAWYERS(%)</u>	<u>JUDGES(%)</u>
1. Payment of Bribe	72	72	56
2. Receipt of Bribe	68	76	56
3. Embezzlement of Public Funds	76	68	84
4. Corporate Securities Fraud	48	60	56
5. Falsifying Public Records	44	40	28
6. Fraudulent Claims Against Government	44	36	70
7. Child Molesting	48	16	28

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Several additional observations about the responses to this question are pertinent. First, not one single prosecutor, defense lawyer or judge listed voluntary or involuntary manslaughter as a crime that is likely to be concealed. Both of

these offenses are currently included among the offenses for which the three year limitations period commences upon discovery of the crime. Second, relatively few of the respondents included conspiracy in their response (20% of prosecutors, 24% of defense lawyers, and 28% of judges). This may reflect the adequacy of present law to deal with the problem of conspiracy. Conspiracy is treated as a continuing crime, and the statute of limitations does not begin to run until its primary object is completed. The courts have been reluctant to treat concealment as one of the primary objects of a conspiracy, however, which would automatically extend the statute of limitations until the conspiracy was uncovered.<sup>69</sup> Third, one perceptive prosecutor noted that many of those charged with concealed crimes are public office holders, and a longer statute of limitations increases the risk of politically motivated prosecutions. Finally, the similarity between the offenses identified as most likely to be concealed, those identified as most susceptible to bureaucratic delays, and those requiring lengthier investigative activity should be noted. While the concealment factor can be accommodated by suspending the limitations period until discovery, the motivation factor and the investigation factor cannot, and they point in opposite directions in terms of the appropriate duration of the limitations period.

The survey questionnaire noted that suspension of the limitations until discovery of the crime, or "tolling" the limitation during a demonstrated period of concealment, are alternatives to a longer period of limitations for concealed crimes. Respondents

were asked to comment on the perceived advantages or disadvantages of these alternatives. Most prosecutors indicated a preference for suspending the statute until discovery of the crime, suggesting the burden of affirmatively proving concealment would be difficult to meet. It was suggested by several prosecutors that the statute of limitations should not begin to run for any crime until it has been discovered. A minority opted for a longer statute of limitations for normally concealed crimes, objecting to having to show "diligence" in discovering the crime. In People v. Swinney,<sup>70</sup> the Court held that it is the victim's reasonable diligence which is at issue, and official diligence becomes an issue only when suspicion arrives at the door of the officials responsible for the suspect's apprehension and prosecution. It was further held that "discovery" by the victim means discovery that a criminal agency was responsible for a loss; mere awareness of a loss would not start the statute running.

There was less agreement among defense lawyers and judges, who were evenly divided among a longer limitations period, commencement at discovery, and "tolling." Several saw practical problems with "tolling," since the issue of affirmative concealment could hardly be litigated without litigating the guilt of the defendant. If the issue was not resolved until trial, one purpose of the statute of limitations would be defeated: avoiding the burden of a trial for long past offenses. Those who opposed a longer statute noted the risk of investigative delays and delayed prosecutions motivated by revenge or political considerations.

(b) The Investigation Factor. The nature of some crimes may require longer investigation to identify the perpetrators. Even after the perpetrators have been identified, there may be legitimate reasons for investigative activity to continue. Some of these reasons were outlined by the U.S. Supreme Court in United States v. Lovasco:<sup>71</sup>

First, compelling a prosecutor to file public charges as soon as the requisite proof has been developed against one participant on one charge would cause numerous problems in those cases in which a criminal transaction involves more than one person or more than one illegal act. In some instances, an immediate arrest or indictment would impair the prosecutor's ability to continue his investigation, thereby preventing society from bringing lawbreakers to justice. In other cases, the prosecutor would be able to obtain additional indictments despite an early prosecution, but the necessary result would be multiple trials involving a single set of facts. Such trials place needless burdens on defendants, law enforcement officials, and courts.

Second, insisting on immediate prosecution once sufficient evidence is developed to obtain a conviction would pressure prosecutors into resolving doubtful cases in favor of early--and possibly unwarranted--prosecutions. The determination of when the evidence available to the prosecution is sufficient to obtain a conviction is seldom clear-cut, and reasonable persons often will reach conflicting conclusions. Even if a prosecutor concluded that the case was weak and further investigation appropriate, he would have no assurance that a reviewing court would agree. To avoid the risk that a subsequent indictment would be dismissed for preindictment delay, the prosecutor might feel constrained to file premature charges, with all the disadvantages that would entail.

Finally, requiring the Government to make charging decisions immediately upon assembling evidence sufficient to establish guilt would preclude the Government from giving full consideration to the desirability of not prosecuting in particular cases. The decision to file criminal charges, with the awesome consequences it entails, requires consideration of a wide range of factors in addition to the strength of the Government's case, in

order to determine whether prosecution would be in the public interest. Prosecutors often need more information than proof of a suspect's guilt, therefore, before deciding whether to seek an indictment.

The survey questionnaire asked the respondents to identify up to six crimes from the list of 24 which require lengthier investigative activity before prosecution is commenced. The crimes most frequently selected appear in Table 6.

TABLE 6

<u>CRIME</u>	<u>PROSECUTION (%)</u>	<u>DEFENSE LAWYERS (%)</u>	<u>JUDGES (%)</u>
1. Corporate Securities Fraud	64	76	100
2. Embezzlement of Public Funds	68	64	70
3. Fraudulent Claims Against Government	56	32	42
4. Conspiracy	48	36	42
5. Receipt of Bribe	44	48	42
6. Payment of Bribe	40	48	28
7. Conflict of Interest	40	36	28
8. Falsifying Public Records	32	40	14

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The correlation between these crimes and those identified for the motivation factor and the concealment factor has already been noted. The same crimes that require lengthy investigative activity are most susceptible to bureaucratic delay.

(c) The Seriousness Factor. The lapse of the Statute of Limitations operates as a statutory grant of "amnesty" to an offender. Viewed in this light, it may be desirable to withhold "amnesty" from some crimes which are regarded as particularly serious. This, of course, is the other side of the coin we have already identified as the "repose factor." The seriousness of the crime can be a rational consideration in setting the duration of a limitations period regardless of whether one views the purpose of the criminal law as deterrence, incapacitation or rehabilitation.

"For example it might be said that: (a) the more serious the offense, the greater the need for deterrence and the more undesirable to offer the possibility of escape from punishment after a short period of limitation; or, (b) the more serious the offense, the greater the likelihood that the perpetrator is a continuing danger to society, and thus the need to incapacitate him whenever he is caught; or, (c) the more serious the offense, the less likely the perpetrator is to reform of his own accord, and thus the need for compulsory treatment whenever he is apprehended. Yet it is also true that the more serious the charge, the more there is at stake for the defendant and the greater is his procedural need for the protection that a limitation period affords."<sup>72</sup>

If the purpose of the criminal law is viewed as retribution, of course, the seriousness factor would be a paramount consideration.

The survey questionnaire asked the respondents to identify up to six crimes which they regarded as so serious they should not be subject to any Statute of Limitations. The crimes most frequently selected appear in Table 7.

TABLE 7

<u>CRIME</u>	<u>PROSECUTORS (%)</u>	<u>DEFENSE LAWYERS (%)</u>	<u>JUDGES (%)</u>
Murder	88	76	56
Kidnapping	64	20	14
Voluntary Manslaughter	52	12	14
Rape	48	12	28
Forcible Sodomy/ Oral Copulation	40	8	0

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The broad concensus of agreement that prosecution for the crime of murder should not be barred by a statute of limitations is consistent with the judgment of every state legislature save one. Only New Mexico, which imposes a 15 year limitation, includes murder among the crimes which may be barred.<sup>73</sup> The universality of this judgment reflects a number of unique aspects of the crime of murder. Prevailing police practice is never to close the files on an unsolved murder case. It is the only crime punishable by death in the vast majority of jurisdictions which have a death penalty.

"There are, to be sure, other crimes of comparable gravity but they are less likely to present equal obstacles to prompt discovery of evidence or to have comparably long continued impact on the sense of general security of the community."<sup>74</sup>

The crimes most frequently selected include those which carry the heaviest penalties on the list, under the California Penal Code. Murder in the first degree is punishable by death,

life imprisonment without possibility of parole, or 25 years to life. Second degree murder is punishable by 15 years to life.<sup>75</sup> Kidnapping for ransom, reward, extortion or robbery is punishable by life imprisonment, without possibility of parole if the victim is harmed.<sup>76</sup> This correlation should not be surprising, since the judgment of which crimes are so serious that punishment should never be barred by lapse of time is very similar to the judgment of how much punishment is appropriate.

The single exception to this pattern is the inclusion of Voluntary Manslaughter by a majority of prosecutors. Voluntary manslaughter is punishable by two, four or six years,<sup>78</sup> which is less than the penalty for Child Molesting<sup>79</sup> or Arson of an Inhabited Structure<sup>80</sup> (three, five or seven years). Other crimes carrying the same penalty as Voluntary Manslaughter were much further down on the prosecutors' list, including mayhem,<sup>81</sup> (included by 16% of prosecutors, 8% of defense lawyers and no judges) and burglary,<sup>82</sup> (included by a single prosecutor and no defense lawyers or judges). The judgment to include Voluntary Manslaughter with Murder may reflect the close relationship between these crimes, and the anomaly of barring prosecution of a lesser included offense while permitting unlimited prosecution of the greater offense. As a practical matter, the ultimate decision whether a homicide is a murder or a manslaughter frequently involves an assessment of the defendant's mental state that must be left to a jury. Thus, a murder prosecution which is delayed beyond the limitations period for voluntary manslaughter may result in the complete acquittal of the defendant, rather than conviction of the lesser included offense.<sup>83</sup>

MODERN TRENDS  
IN OTHER JURISDICTIONS

Recent changes in the duration of statutes of limitations in other jurisdictions can be summarized in one word: up. In 1954, the University of Pennsylvania Law Review prepared a chart showing the statutory period for a selected list of crimes in every American jurisdiction. That chart is attached to this report as Appendix II. To briefly summarize its contents:

- ... Twelve states, mostly in the South, had no statute of limitations for most felonies.
- ... Among those states having a statute of limitations, the average statutory period for felonies was four years, with sixteen states setting the usual period at three years, and fourteen setting the usual period at five or six years.

As part of this study, the limitations period currently in effect in each state for the same crimes was ascertained. This information is shown in parentheses on Appendix II where it differs from the 1954 figures. It shows that:

- ... Thirty states have made some change in their statute of limitations in the intervening period.
- ... Five states enacted general increases of their felony limits: Arizona (5 to 7 years), Delaware (2 to 5 years), Florida (2 to 3 years), New Mexico (3 to 5 years), and South Dakota (3 to 7 years).

... With rare exceptions, the only reductions in the statutory periods have been the creation of a limitations period in jurisdictions which previously had no limitation. Several states which previously had no statute of limitations enacted a general limitation of 6 years (Louisiana, Maryland and Ohio).

... Increases in the statute of limitations for individual crimes have been most frequent for rape, with eight states increasing the statutory period for this crime.

Today, the average statutory period is still four years, but the number of states setting the usual period at five or six and even seven years has grown to nineteen.

The general statute of limitations for federal offenses was increased from three years to five years in 1954.<sup>84</sup> In the massive revision of the federal criminal code, it was proposed that the five year limitations period be continued.<sup>85</sup>

## VI.

### STRIKING A BALANCE:

#### CATEGORIZING THE SERIOUSNESS FACTOR

As we have already seen, many of the factors offered to justify a shorter limitations period directly conflict with the factors offered to justify a longer period. The same crimes most susceptible to bureaucratic delay (the motivation factor) require the longest investigations (the investigation factor). Whether we find the repose factor or the seriousness factor more important may turn on whether we perceive the purpose of the criminal law to be retribution, rehabilitation, deterrence or incapacitation. As noted by the drafters of the Model Penal Code:

"To the extent that length of periods of limitation can be rationalized at all they, like penalty provisions, must be viewed as compromises reflecting the multiple and sometimes conflicting aims of the criminal law."<sup>86</sup>

The significance of one's "global view" of the purpose of the criminal law was certainly borne out in the survey results. Respondents were asked to enter a plus or minus to indicate whether they thought the limitations period should be increased or decreased for each crime listed in Appendix III. Prosecutors were generally in favor of increasing the limitations period, with a majority in favor of an increase for payment of a bribe and robbery. Very few suggested reducing any periods except

embezzlement of public funds and falsifying public records, favored by 24%. Two prosecutors even voted to increase the limitation for embezzlement of public funds, which now has no limitation. Defense lawyers were consistent in opposing any increases, and calling for decreases in a number of crimes. A majority favored reduction for forcible sodomy or oral copulation and for kidnapping. Close to a majority wanted reductions for rape, embezzlement of public funds, and falsifying public records. All of the results are tabulated in Appendix III.

Except for the factors of seriousness and repose, it does not appear that most of the rationales for the duration of a statute of limitations lend themselves to categorization by crime. To some extent, the concerns which are implicit in the concealment factor, the staleness factor, and the motivation/-investigation factors can be accommodated by special statutory exceptions to the general limitations period. This is the format suggested by the Model Penal Code, which could be easily adapted to California Law. The Model Penal Code creates three categories of felony limitation:

- (1) A prosecution for murder may be commenced at any time.
- (2) A prosecution for a felony of the first degree must be commenced within six years after it is committed.
- (3) A prosecution for any other felony must be commenced within three years after it is committed.<sup>87</sup>

This classification scheme recognizes that the most significant crime specific variable to be considered is the seriousness of the crime, and the judgment as to seriousness is no different than the judgment made in setting the maximum sentence for the crime. There are very few crimes in the Model Penal Code which are first degree felonies, however. First degree felonies carry a maximum sentence of life imprisonment. Thus, the six year limitation would actually apply to many offenses which are without any limitation in many states, such as kidnapping.

This approach could be readily adapted to California without accepting the judgment of the Model Penal Code as to which crimes should be without limitation, or which crimes should be subject to the six year limitation. One possible adaptation is attached to this Report as Appendix IV.

New York has patterned its statute of limitations upon this Model Penal Code Section, defining the limitations period by reference to the maximum penalty for the crimes affected. New York allows prosecution of a Class A felony to be commenced at any time, while prosecution of all other felonies must commence within five years after commission.<sup>88</sup> Class A felonies are punishable by life imprisonment in New York, and currently include murder, attempted murder, first degree kidnapping, first degree conspiracy, first degree drug sales, and first degree arson.<sup>89</sup> Other states which have adopted the Model Penal Code in its entirety have made substantial modifications in the basic structure of the limitations section. New Jersey adopted a general limitation of five years after commission for all crimes

except murder, which is subject to no limitation, and a laundry list of offenses ordinarily committed by public officials, subject to a limitation of seven years after commission.<sup>90</sup> In Pennsylvania, a three-tiered structure was adopted, with no limitation for murder, a five year limitation for six specified first degree felonies<sup>91</sup> and a two year limitation for any other offense.<sup>92</sup> In 1980, the statute was amended to add voluntary manslaughter to murder, allowing prosecution to be commenced at any time.<sup>93</sup>

(a) No Limitation

The Model Penal Code's limitation of this category to murder was explained as follows:

Should there be a period of limitation for all offenses? The draft provides for one except for the offense of murder, in the view that it is desirable to maintain the common police practice never to close the files on an unsolved murder case. There are, to be sure, other crimes of comparable gravity but they are less likely to present equal obstacles to prompt discovery of evidence or to have comparably long continued impact on the sense of general security of the community. The single exception, therefore, appears reasonable, though some members of the Council preferred no exception to the principle of limitation.<sup>94</sup>

At the time this draft was adopted, however, the Model Penal Code's position on the death penalty was unresolved. The draft now provides for imposition of the death penalty for only one crime: murder. The judgment that a crime should be punishable by death is the ultimate determination of its seriousness. No reason appears why any crime which is punishable by death should

be excepted from the treatment traditionally accorded the crime of murder. In California, this would mean expanding the list to all capital crimes, which would include:

First Degree Murder (Pen. Code § 190)

Treason (Pen. Code § 37)

Procuring Execution by Perjury (Pen. Code § 128)

Train Wrecking Resulting in Death (Pen. Code § 219)

Assault with a Deadly Weapon by Life Term Prisoner  
(Pen. Code §4500)

Making Defective War Materials Which Cause Death (Mil.  
& Vet. Code § 1672).

It is doubtful that any of these crimes are "less likely to present equal obstacles to prompt discovery of evidence," or have less impact on the sense of general security in the community than murder. While one may debate the suitability of capital punishment for particular crimes, once that judgment is made, it should carry with it a determination that prosecution of those crimes should not be barred by a statute of limitations.

If the line is drawn at capital offenses, this would eliminate kidnapping, embezzlement of public funds, and falsification of public records from the current list of offenses subject to no limitation. No logical reason supports the continued inclusion of kidnapping, which is no longer a capital offense in California, except the seriousness of the penalty of life imprisonment which is possible. That rationale would equally support the inclusion of all crimes punishable by life imprisonment. It does not make much sense to maintain embezzlement of public funds and falsification of public records as no limitation crimes if

the concern for their concealment is accomodated elsewhere in the code. In terms of seriousness as reflected in their three year maximum penalty, they are certainly out of place in the company of capital offenses.

(b) Six Year Limitation

The Model Penal Code assessment of which crimes should be regarded as serious enough to qualify for the six year limitation period can also be modified. The California Penal Code now has a "laundry list" of "serious felonies" in Penal Code § 1192.7, added by Proposition Eight on June 9, 1982. Plea bargaining is precluded for these felonies, and they are also utilized for sentence enhancement purposes under Penal Code § 667. Although this list embodies a popular judgment of which felonies the public regards as "serious," it should not be utilized to categorize the offenses subject to a longer statute of limitations for the following reasons:

- (1) It would add a wide variety of disparate crimes not presently subject to the six year limitation.
- (2) It would include any felony in which great bodily injury was inflicted or a firearm was used, thus making the availability of the six year limitation turn on what sentence enhancements were pleaded by the prosecution.
- (3) The list is poorly drafted, including categories of crimes not defined elsewhere in the code, such as "burglary of a residence."

(4) The list cannot be amended or modified except by further initiative or a two thirds vote of the membership of both houses of the legislature.

It would make more sense to simply categorize the crimes subject to the longer limitations period in terms of the maximum sentence prescribed for the crime. For example, the statute could read:

"A prosecution for an offense punishable by imprisonment in the state prison for nine years or more must be commenced within six years after it is committed."

If a nine year maximum were utilized, the six year limitation would include violations of Penal Code § 451 (Arson causing bodily injury); Penal Code §§ 12308-09 (Explosion of destructive device with intent to murder, or causing bodily injury); and Penal Code § 664 (attempting a crime punishable by life imprisonment). If an eight year maximum were utilized, the six year limitation would include all of the crimes presently covered by the six year statute, with the exception of Penal Code §§ 286(f) and 288a(f) (Sodomy or Oral Copulation of unconscious victim) and acceptance of a bribe by a public official. It would also expand the list to include violations of Penal Code § 245(c) (assault with firearm upon peace officer or fireman engaged in performance of duties).

VII.

ACCOMMODATING THE

OTHER FACTORS

The Model Penal Code includes a number of exceptions to the general limitations determined by seriousness of the crime, designed to accommodate the concerns embodied in the concealment factor, the motivation/investigation factor, and the staleness factor. Each of these provisions would be readily adaptable to California law.

(a) Accommodating the Concealment Factor

The concern that one might escape prosecution by concealing his crime until after the statute of limitations has run is reflected in the current provisions of California law, which list fifteen specific offenses for which the statute begins to run upon discovery. Other crimes, such as embezzlement of public money, falsification of public records and acceptance of a bribe by a public official, are subjected to a longer statute of limitations for the same reason. Most of these crimes have one of two elements in common: they involve a fraud or breach of fiduciary duty, or they involve misconduct by a public officer. In either event, the perpetrator is in a unique position to conceal his crime. While there is motivation for the concealment of all crime, it is ordinarily desirable to start the period of limitation at the time of commission. Where the opportunity for

prolonged concealment is great, however, different treatment is warranted. The Model Penal Code provides for these two exceptions with the following provisions:

(a) A prosecution for any offense a material element of which is either fraud or a breach of fiduciary obligation may be commenced within one year after discovery of the offense by an aggrieved party or by a person who has legal capacity to represent an aggrieved party or a legal duty to report such offense and who is himself not a party to the offense, but in no case shall this provision extend the period of limitation otherwise applicable by more than three years.

(b) A prosecution for any offense based upon misconduct in office by a public officer or employee may be commenced within one year after discovery of the offense by a person having a duty to report such offense, but in no case shall this provision extend the period of limitation otherwise applicable by more than three years.

The proviso that the period of limitations otherwise applicable cannot be extended more than three years would prevent indefinite suspension of the statute, and thus accommodate concern for the staleness factor. As a practical matter, since most of these offenses would ordinarily be subject to the three year limitations period, it means a six year ceiling would be imposed.

The requirement that prosecution be commenced within one year of the discovery of the crime would apply only where the normal three year limitation has expired, and is a reasonable accommodation for the motivation factor.

The New York Criminal Procedure Law, enacted in 1970, included a provision closely modelled on this section of the Model Penal Code. It provides as follows:

3. Notwithstanding the provisions of subdivision two, the periods of limitation for the commencement of criminal actions are extended as follows in the indicated circumstances:

(a) A prosecution for larceny committed by a person in violation of a fiduciary duty may be commenced within one year after the facts constituting such offense are discovered or, in the exercise of reasonable diligence, should have been discovered by the aggrieved party or by a person under a legal duty to represent him who is not himself implicated in the commission of the offense.

(b) A prosecution for any offense involving misconduct in public office by a public servant may be commenced at any time during the defendant's service in such office or within five years after the termination of such service; provided however, that in no event shall the period of limitation be extended by more than five years beyond the period otherwise applicable under subdivision two.<sup>96</sup>

It should be noted that a maximum limitation on the extension permitted was deleted from paragraph (a), while paragraph (b) was modified to run not from discovery of the offense, but from the office-holder's departure from office. The latter change was explained as follow:

Paragraph (b) of the subdivision, dealing with the prosecution of offenses involving misconduct in office by public servants, is new. Numerous such offenses are defined both in and outside of the Penal Law. Because of the inherent nature of the circumstances under which such offenses are committed, their commission is often not discovered until the incumbent public servant has left office, which may be some time after the normal statute of limitations has run. Out of these considerations, the new provision extends the regular period of limitation to a point five years beyond the public servant's tenure of office, provided, however, that the total period may not exceed the regular limitation period for the crime involved by more than five years. In short, the regular limitation period for a felony of this nature may be stretched from five years to, at most, ten years; and for a misdemeanor of this nature from two years to, at most, seven years.<sup>97</sup>

In People v. Glowa,<sup>98</sup> the constitutionality of this provision was upheld against a claim that it denied public officeholders equal treatment under the law. The Court held special treatment of officeholders was justified by the rationale expressed in the practice commentary quoted above:

"Because of the inherent nature of the circumstances under which such offenses are committed, their commission is often not discovered until the incumbent public servant has left office."<sup>99</sup>

Pennsylvania also modified the Model Penal Code provision relating to offenses committed by public officers, originally permitting prosecution at any time while the defendant is in office or within two years thereafter, with a maximum extension of the normal limitations of up to three additional years.<sup>100</sup> In 1978, this was amended to extend the period to five years after the defendant leaves office, with a maximum extension of eight years longer than the normal limitation.

The New York and Pennsylvania modifications of this Model Penal Code provision create a substantial risk for public office holders that prosecution may be motivated by political retaliation for long-forgotten offenses, and include no accommodation to motivate prompt investigation upon discovery of the offense. On the other hand, paragraph (b) of the Model Penal Code may be unrealistic in utilizing discovery of the offense as the trigger, since the only person in a position to report it may be under the control of the officeholder, or even a participant in the offense. It is recommended that the paragraph (b) be modified to repeat the language of paragraph (a), which triggers the statute upon discovery by a person having a duty to report such offense

"and who is himself not a party to the offense." A clause should also be inserted to allow the prosecution to be commenced within one year of the termination of service in office, but still subject to the three year ceiling on extensions. These modifications have been incorporated in the draft attached as Appendix IV.

(b) Accommodating the Motivation/Investigation Factor.

The present California statute of limitations, by permitting prosecution of some offenses three years after "discovery," allows the indefinite suspension of the statute until discovery, and then would permit three years after discovery for the initiation of a prosecution. If discovery of an offense is delayed, prompt investigation of that offense should be given highest priority. Thus, the Model Penal Code requires commencement of prosecution within one year under circumstances where the normal limitation has been extended. One year seems adequate to complete such investigations. Since by definition these situations involve criminal conduct completed more than three years and as much as six years earlier, the risks encompassed by the staleness factor certainly justify a requirement that the investigation be promptly completed.

(c) Accommodating the Staleness Factor.

While we have concluded that the staleness factor is not crime specific, there are certain categories of crimes which present unique risks of staleness, since by their nature they are susceptible to fraudulent prosecution. The Model Penal Code deals with these crimes individually, rather than generally:

Finally, should special short periods of limitation be prescribed for offenses which by their nature are likely to be the subject of fraudulent prosecutions? Some provision of this sort is needed. The choice is whether to include it in a general section or to deal with each situation specifically in the section defining the offense by requiring, for example, that the victim of the offense make a complaint within a certain period of time. Since the number of such situations may be numerous and since the specific needs may vary from offense to offense, facility in drafting and in use of the code will be furthered if specific provisions of this sort are included with the substantive offense rather than in a general section. That has been the assumption to date. See: Section 207.4, RAPE AND RELATED OFFENSES, SUBSECTION (5): PROMPT COMPLAINT; CORROBORATION, providing that no prosecution may be commenced unless notice is given to officials within six months of occurrence; or, if an incompetent is involved, within six months after a competent person learns of the offense; SECTION 206.13, THEFT BY SPOUSE; OTHER MEMBERS OF HOUSEHOLD: SERVANTS, SUBSECTION (4): NECESSITY OF PROMPT COMPLAINT, providing that no prosecution may be commenced unless complaint within six months after victim learns of the offense and the probable identity of the offender. In both of these situations the statute of limitations may for all practical purposes be reduced to six months, provided of course that the knowledge of the offense comes to the attention of the victim. If upon completion of the substantive portions of the code it appears that such provisions are numerous and that they are capable of generalization, it may be worth while to consider adding them to the general provisions.102

Since the California Penal Code contains no requirement of prompt complaint with respect to specific substantive offenses, some provision should be incorporated into the statute of limitations. This could take one of two forms.

First, it appears that one common element pervades the offenses which present this risk: they are generally offenses where lack of consent by the victim is an element which the prosecution must prove. It does not seem unreasonable in such cases

to require prompt complaint by the victim within a shorter period of time than the three or six year period encompassed by the statute of limitations. (None of the capital crimes subject to no limitation require a showing of lack of consent). The six month period established by the Model Penal Code also appears reasonable, with exception for incompetent victims and victims who did not discover the offense.

As a second alternative, the statute could enumerate the offenses where prompt complaint is required. An enumeration of Penal Code sections 261, 286, 288a and 289 would appear warranted. These sections are also enumerated in the definition of consent contained in Penal Code § 261.6.

Both alternatives are presented in Section (4) of the draft in Appendix IV. The language is based on Section 207.4(5) of the Model Penal Code, requiring prompt complaint for rape and related offenses. Even if the perpetrator was unidentified, this would permit the normal limitations period to apply, as long as prompt complaint was made.

Under either alternative of the prompt complaint requirement proposed, it is clear that the requirement does not apply to the crime of child molestation in violation of California Penal Code § 288, or the crime of unlawful sexual intercourse with a female under age 18, in violation of California Penal Code § 261.5. Lack of consent by the victim is not an element of either offense, nor is consent an affirmative defense. Thus, the problem encountered in the Pennsylvania enactment of a prompt complaint requirement will be avoided. When Pennsylvania adopted the Model Penal Code in 1972, a prompt complaint requirement was enacted to apply to

all sexual offenses, including statutory rape and corruption of a minor.<sup>103</sup> In 1976, a case arose in which a fifteen year old girl was seduced by her stepfather. Although she immediately reported the incident to her mother, the mother disbelieved her and sent the girl to live with an aunt and uncle. The girl also related the incident to them, but no action was taken to report the incident to authorities until one year later, when the mother filed an unrelated assault complaint against the stepfather. Based on these facts, the Pennsylvania Superior Court held the charges had to be dismissed under the prompt complaint statute.<sup>104</sup> After this case was submitted to the appellate court, the Pennsylvania legislature repealed the prompt complaint statute before the opinion was even announced.<sup>105</sup>

One other accommodation to the staleness factor is advisable. Even if a crime is concealed or the statute is tolled for some other reason, an indefinite suspension of any limitation period does not appear desirable, especially where the limitations period is already as long as six years. The normal retention period for documents and records has elapsed, and the risk that essential witnesses are unavailable becomes too substantial. Thus, the Model Penal Code puts a "cap" on the exceptions to the normal limitations period of three additional years. It might be argued that this could permit a defendant to avoid prosecution by fleeing the state or concealing his crime as long as he succeeds three years beyond the normal limitations period and this argument has apparently persuaded many states to permit indefinite suspension of the statute. This overlooks the following considerations:

(1) The public also has an interest in having legal disputes accurately resolved on the basis of evidence that is not stale.

(2) The factual issues involving tolling or suspension of the statute may themselves have to be litigated on the basis of stale evidence.

(3) Any affirmative acts of concealment delay commencement of the limitations period to the extent they are part of a "continuing crime."<sup>106</sup>

(4) If the person refrains from further criminal activity, the likelihood increases with the passage of time that he has reformed, diminishing pro tanto the necessity for imposition of the criminal sanction. If he has repeated his criminal behavior, he can be prosecuted for recent offenses committed within the period of limitation.<sup>107</sup>

(5) It is desirable to lessen the possibility of blackmail based on a threat to prosecute or disclose evidence to enforcement officials. After some defined period of time, a person ought to be allowed to live without fear of prosecution.<sup>108</sup>

It is submitted that these considerations justify an accommodation for the staleness factor, placing an absolute limit of three years beyond the normal limitation period when exceptions or tolling provisions apply.

## VIII.

### COMMENCEMENT OF PROSECUTIONS

As previously noted, the California Penal Code currently has two alternative provisions determining when prosecution is commenced for purposes of the statute of limitations. The provision now in effect requires the filing of an indictment or the issuance of an arrest warrant. In the event Hawkins v. Superior Court<sup>109</sup> is abrogated, we will revert to the previous requirement that an indictment be filed, an information filed, or a case certified to Superior Court before the prosecution is deemed to have commenced.

The Model Penal Code provides that a prosecution is commenced by either indictment or issuance of a warrant, and this provision is incorporated in the draft in Appendix IV as section (5). This would make the current provision permanent, adding only a requirement that the warrant be executed without unreasonable delay. The reasons supporting this change are fully explained in the commentary to the Model Penal Code:

The draft requires that "a prosecution must be commenced" within the period specified. The term "prosecution is commenced" is defined to mean either that (a) an indictment is found; or (b) a warrant of arrest is issued provided that such warrant is executed without unreasonable delay. See e.g. Wis. Stat. (1955) § 939.74; N.Y. Code Cr. Proc. § 144.

Current legislation is in the main of two types:

(1) Statutes requiring that indictment be found or an information filed (e.g. Cal. Penal Code §§ 800-801; Ill. Stat. Ann. §§ 628-30; Mass. Laws Ann. c. 277, § 63).

(2) Statutes requiring merely that prosecution be commenced (e.g. Del. Code Ann. tit. 11, §§ 2901-2; N.M. Stats. Ann., vol. 6, § 41-9-1). Under this type of statute courts have generally held that the issuance of a warrant of arrest is sufficient. For extensive compilation of cases decided under both types, see 90 A.L.R. 452 (1934).

The draft takes the view that a warrant of arrest is sufficient. In so doing, it proceeds on the assumption that the basic purpose of a statute of limitations is to insure that the accused will be informed of the decision to prosecute and the general nature of the charge with sufficient promptness to allow him to prepare his defense before evidence of his innocence becomes weakened with age. His further right to have the matter promptly disposed of by trial is not dealt with here. For provisions relating to the length of time between commitment to custody and indictment or information and between indictment or information and trial see A.L.I., Code Crim. Proc. (1930) sections 292-295. See also Art. 8 La. Code Crim. Proc. (1928), where both the statute of limitations and a provision dealing with right to speedy trial are dealt with in the same section.

Both the finding of an indictment and the issuance of a warrant of arrest require a formal decision by the prosecution as to the general nature of the charge and the identity of the accused. Both will ordinarily come to the attention of the accused.

If further proceedings are not promptly taken after the finding of an indictment, the accused is entitled to have the indictment dismissed (see A.L.I., Code Crim. Proc. (1930) section 292; Rule 48 (b) Fed. Rules Crim. Proc.) and may in a proper case claim deprivation of his constitutional right to a speedy trial. United States v. McWilliams, 69 F. Supp. 812 (1946).

There is a danger that a warrant may be issued and allowed to lie around without diligent effort to execute it. See e.g. State v. Bowman, 106 Kan. 430 (1920) (warrant issued but at direction of county attorney, the sheriff made no effort to serve it for five months). The draft requires that the warrant be executed within a reasonable time. This was the conclusion of the Kansas court in State v. Bowman, supra. In determining what is reasonable, factors such as the inability to find the accused, the fact that the accused is in prison, and others too numerous to specify in a statute may be taken into account.

The requirement that an information be filed is rejected. In some states that would require that the accused be apprehended and given a preliminary examination before the period would cease to run. Since in many instances delay between apprehension and the filing of the information is in the interest of the defendant, such a provision would tend to force speed in the proceedings to the detriment of the defendant. To require that the defendant be apprehended before "a prosecution is commenced" would require a tolling of the statute in situations where the accused is beyond the reach of process. See e.g. State v. Watson, 145 Kan. 792 (1937) dealing with statute which make "concealment" enough to toll the running of the period of limitation.110

IX.

TOLLING PROVISIONS

The current California provision for tolling the statute of limitations, Penal Code § 802, excludes any time the defendant is outside the state, for whatever reason, from the statutory period. If a defendant changed his identity and concealed himself in another city, but did not cross the state border, the statute would not be tolled.<sup>111</sup> If the defendant is drafted into the armed services and sent overseas, the statute would be tolled. It makes little sense to permit tolling without reference to the purpose of the absence, and to preclude tolling simply because a fugitive from justice stays within the state's borders. Both of these anomalies would be corrected by paragraph (6)(a) of the Model Penal Code, which has been included in the draft in Appendix IV. This is based upon the theory that deliberate impediment to investigation warrants tolling the statute. Many other jurisdictions require absence be "with a purpose to avoid detection," so there is ample case law construing this language.<sup>122</sup>

The language in Penal Code § 802 permitting charges to be brought although the defendant was outside the state at the time of the offense is unnecessary, since Penal Code § 27 clearly applies.

An additional tolling provision from the Model Penal Code is included as paragraph 6(b) of the draft in Appendix IV. This simply excludes any period from the Limitations period when a

prosecution for the same conduct was pending. Thus, if an indictment or information is dismissed for a technical defect under a situation where the double jeopardy clause or a statute would not preclude reprosecution, the statute of limitations will not have run out during the pendency of the prosecution. There is now a similar tolling provision in Penal Code § 802.5, but it only permits recommencing the same "criminal action" which was dismissed, an unnecessarily narrow concession. It is also a temporary measure which will be automatically repealed if Hawkins v. Superior Court is abrogated.<sup>113</sup> There is no reason why such a tolling provision should not become a permanent part of the California Penal Code. The "same conduct" standard is designed to give maximum flexibility to the prosecution while protecting the defendant against enlargement of the charges after the statute has run:

The draft is broader than current statutes in that it provides that the statute does not run during the time that a prosecution is pending for the same conduct. It is sometimes said that the tolling only applies to a subsequent prosecution for the same offense. See 90 A.L.R. 452, 461. If this means a violation of the same statute based upon the same facts, it is too narrow, since the dismissal may have been based upon a substantial variation between the previous allegations and the proof. Other statutes require that the subsequent prosecution be for an offense arising out of the same transaction. See N.M. Stats. Ann. sec. 41-9-3 (1953): ". . . provided that the offense last charged is based upon, or grows out of, the same transaction upon which the first indictment was founded." The test of the "same conduct", involving as it does some flexibility of definition, states a principles that should meet the reasonable needs of prosecution, while affording the defendant fair protection against an enlargement of the charges after running of the statute.<sup>114</sup>

X.

RETROACTIVITY OF CHANGES

The changes suggested in the proposed draft based on the Model Penal Code will have the effect of increasing the limitations period for some crimes and shortening it for others. Can these changes apply retroactively, to crimes committed before adoption of the changes?

With respect to a shortened period, there is no constitutional obstacle to either giving retroactive effect or denying it. Retroactivity would confer a benefit on the defendant not presently available. Whether that benefit is conferred would simply be a question of legislative intent. The legislature could provide that the shortening of the limitation period for any offense will not apply to crimes committed prior to the effective date of the change.<sup>115</sup> Legislative intent should be clearly stated, to avoid judicial confusion and inconsistency. It would seem to make most sense to allow any shortened period to apply retroactively. The legislative enactment embodies a judgment, based on the seriousness of the offense, that prosecution is no longer warranted after the lapse of a stated period. It would seem incongruous, after such a judgment has been made, to deny its benefits to those whose offense was committed prior to enactment, while conferring it upon subsequent offenders. It could lead to the prosecution of offenders whose crimes preceded the barred crimes of more recent offenders.

The constitutionality of retroactive application of extended periods of limitation has been frequently litigated, both in California and elsewhere. The leading case is Falter v. United States,<sup>116</sup> where Judge Learned Hand said the statute could be extended "while the chase is on." As long as the original period has not expired, an extension of the period would not violate the constitutional prohibition of ex post facto laws.

California courts have utilized the same distinction in applying the ex post facto prohibition of Article I, § 9 of the California constitution. In Sobiek v. Superior Court,<sup>117</sup> the court held that a prosecution for forgery was barred despite the 1970 amendment of Penal Code § 800 providing the three year statute of limitations for forgery commences upon discovery, rather than commission. Although the forgery had been discovered within the previous three year period, it had been committed more than three years prior to enactment of the amendment. Thus, the court concluded, "The statute of limitations having run prior to the amendment extending it, application of the amendment to petitioner's situation would constitute application of ex post facto legislation."<sup>118</sup>

Where the previous period of limitation has not expired at the time of an amendment extending it, however, the California courts have applied the extension to crimes committed prior to the amendment. In People v. Eitzen,<sup>119</sup> a former deputy sheriff was charged with embezzlement of property entrusted to his care during a period of employment from November 11, 1966 to September 23, 1969. It was alleged that the loss was not discovered until

October 7, 1972. An information was filed on April 9, 1973. Since the amendment of Penal Code § 800 providing the limitation for grand theft ran from discovery of the offense was enacted November 10, 1969, the previous limitation of three years after commission had not yet run at the time of the amendment, and the court held the new statutory period would apply.<sup>120</sup>

## FOOTNOTES

\* Professor of Law, Loyola Law School of Los Angeles. The author wishes to acknowledge the assistance of Fred Rarick, Loyola Law School '83, in the preparation of this article. This article was prepared to provide the California Law Revision Commission with background information for its study of this subject. The opinions, conclusions, and recommendations contained in the article are entirely those of the author and do not necessarily represent or reflect the opinions, conclusions, or recommendations of the California Law Revision Commission.

1. Statutes of California, 2nd Sess., 1851, ch. 29, p. 222, §§ 96-100.
2. Stats. Calif., 1891, c. 141, p. 192, § 1.
3. Cal.Pen.Code, §§ 424, 514; Code Am. 1880, c. 42, § 5, c. 88, § 1.
4. Stats.Calif. 1976, c. 1139, §§ 197, 230. Since no penalty is specified in Penal Code § 514, Penal Code § 18 applies, which imposes a sentence of 16 months, two or three years.
5. Stats.Calif. 1927, c.619, p. 1046, §1.
6. 230 C.A. 2d 615, 41 Cal.Rptr. 219 (1964).
7. Stats.Calif. 1970, c. 704, § 1, p. 1333.
8. Stats.Calif. 1951, c. 1749, §1.
9. Stats.Calif. 1977, c. 316, § 15.
10. Stats.Calif. 1969, c. 1171, §1.
11. Sen. Bill No. 1154, April 8 1969, Amended in Senate, May 29, 1969.
12. Stats.Calif. 1970, c. 704, § 2.
13. Stats.Calif. 1971, c. 954, § 1.
14. Stats.Calif. 1972, c. 1046, § 2.
15. A.B. 1057, March 14, 1972. See In Re Kristovich, 18 Cal. 3d 468 (1976).
16. Stats. Calif. 1975, c. 1047, § 1.
17. Id., § 2.

18. See Morantz, "The Fingerprint That Lied," Coast Magazine, pp. 62-70 (Dec. 1974).
19. Stats. Calif. 1978, c. 663, § 8.
20. Stats. Calif. 1976, c. 1139, § 10.
21. Stats. Calif. 1981, c. 1017, § 1.
22. Stats. Calif. 1982, c. 533, § 1.
23. Stats. Calif. 1941, c. 1113, § 1, p. 2816.
24. Stats. Calif. 1976, c. 1139, §§ 104, 109, 111, 128.
25. Penal Code §§ 70, 94.
26. Stats. Calif. 1980, c. 1307, §2.
27. Interview with Thomas J. Nolan, Jr., March 7, 1983.
28. "Double Joining" is a legislative device to establish the priority of conflicting bills enacted during the same legislative session. See People v. Henderson, 107 Cal. App. 3d 475, 494, 166 Cal. Rptr. 20 (1980); In Re Thierry S., 19 Cal. 3d 727, 739-40, 139 Cal. Rptr. 708 (1977).
29. Stats. Calif. 1981, c. 896, §3.
30. 91 C.A. 3d 213, 154 Cal. Rptr. 107 (1979).
31. Stats. Calif. 1980, c. 1093, §1.
32. Penal Code §27 provides:
  - (a) The following persons are liable to punishment under the laws of this state:
    1. All persons who commit, in whole or in part, any crime within this state;
    2. All who commit any offense without this state which, if committed within this state, would be larceny, robbery, or embezzlement under the laws of this state, and bring the property stolen or embezzled, or any part of it, or are found with it, or any part of it, within this state;
    3. All who, being without this state, cause or aid, advise or encourage, another person to commit a crime within this state, and are afterwards found therein.
  - (b) Perjury, in violation of Section 118, is punishable also when committed outside of California to the extent provided in Section 118.
33. Stats. Calif. 1951, c. 1674, §23.
34. People v. Crosby, 58 Cal. 2d 713, 25 Cal. Rptr. 847 (1962); Ex Parte McGee, 29 C.A. 2d 648, 85 P.2d 135 (1939).

35. The legislative history of this change is described in the landmark U.S. Supreme Court decision in Hurtado v. California, 110 U.S. 516 (1884), holding that the Fourteenth Amendment due process clause did not require the states to initiate criminal prosecutions by Grand Jury indictment.
36. Code Am. 1880, c.47, §§ 8-10.
37. Penal Code §859a, Stats. Calif. 1935, c.141, §2.
38. Stats. Calif. 1935, c. 193, §1.
39. Stats. Calif. 1933, c. 648. §1.
40. 22 Cal. 3d 584, 150 Cal. Rptr. 435 (1978).
41. Stats. Calif. 1981, c. 1017, §1.5.
42. Id. §3.
43. Id. §4.
44. Cox, "Criminal Justice Officials Approve Speedy Trial Act," Los Angeles Daily Journal, Part I, p. 1, Feb. 17, 1983.
45. Comment, Model Penal Code, Tent. Draft No. 5, §1.07.
46. 404 U.S. 307 (1971).
47. 404 U.S. at 322-23.
48. Id. at 324.
49. 431 U.S. 767 (1977).
50. 431 U.S. at 796-797.
51. 12 Cal. 3d 641 (1974).
52. People v. Swearingen, 84 C.A. 3d 570 (1978).
53. See Loftus, Eyewitness Testimony, (Harv. U. Press, 1980); Yarmey, The Psychology of Eyewitness Testimony (Free Press, 1980); Ellis, Davis & Shepherd, "Experimental Studies of Face Identification," 3 J. of Crim. Defense 219 (1977); Levine & Trapp, "The Psychology of Criminal Identification: The Gap From Wade to Kirby," 121 Pa.L.Rev. 1078, 1101 (1973); Uelman, "Testing the Assumptions of Neil v. Biggers: An Experiment in Eyewitness Identification," 16 Crim.L.Bull. 358 (1980).
54. 409 U.S. 188, 199 (1972).
55. 616 F.2d 283 (7th Cir. 1980)

56. 616 F.2d at 293. See also Nesselson & Lubet, "Eyewitness Identification in War Crimes Trials," 2 Cardozo L. Rev. 71 (1980).
57. Note, "The Statute of Limitations in Criminal Law: A Penetrable Barrier to Prosecution," 102 U.Pa.L.Rev. 630 (1954).
58. Greenwood, Chaiken & Petersilia, The Criminal Investigation Process (D.C. Heath & Co., 1977).
59. Id., Table 8-3, p. 110.
60. Id., p. 110.
61. Mo. Code, Title 38, c. 556, §556.036.
62. Id., p. 118.
63. Comment, Model Penal Code, Tentative Draft No. 5, §1.07, p. 16.
64. Cal. Pen. Code §19a.
65. Cal. Pen. Code §18.
66. Cal. Pen. Code §§190, 190.1-190.5.
67. 230 C.A. 2d 615, 621, 41 Cal. Rptr. 219 (1964).
68. 230 C.A. 2d at 621.
69. People v. Diedrich, 31 Cal. 3d 263 (1982); People v. Saling, 7 Cal. 3d 844 (1972); People v. Leach, 15 Cal. 3d 419 (1975); People v. Zamora, 18 Cal. 3d 538 (1976).
70. 46 C.A. 3d 332, 120 Cal. Rptr. 148 (1975).
71. See n. 49, supra, 431 U.S. at 792-95. Additional reasons for investigative delay are outlined in Amsterdam, "Speedy Criminal Trial; Rights and Remedies," 27 Stan. L. Rev. 525 (1975).
72. Comment, Model Penal Code, Tent. Draft No. 5, §1.07, p. 20.
73. N.M. Code, c.30, Criminal Offenses, §30-1-8.
74. Comment, Model Penal Code, Tentative Draft No. 5, §1.07, p. 17.
75. Cal. Pen. Code §190.
76. Cal. Pen. Code §209.
77. Cal. Pen. Code §§ 264, 286(c), 288a(c).
78. Cal. Pen. Code §193.

79. Cal. Pen. Code §288 (three, six or eight years).
80. Cal. Pen. Code §450 (three, five or seven years).
81. Cal. Pen. Code §203.
82. Cal. Pen. Code §459.
83. See People v. Picetti, 124 Cal. 361 (1899).
84. Ch. 1214, §10, 68 Stat. 1142, renumbered Sept. 26, 1961, as 75 Stat. 648. Pub. L. No. 87-299; 18 U.S.C. §3282.
85. S. 1, Ch. 5, §511; See Report, Sen. Jud. Comm.; Working Papers, Federal Criminal Code Commission, pp 281-298.
86. Comment, Model Penal Code, Tentative Draft No. 5, §1.07, p. 20.
87. Model Penal Code, §1.06.
88. N.Y. Crim. Proc. Law, §30.10.
89. Practice Commentary, 11A McKinney's Consol. Laws of N.Y. Ann., CPL §30.10.
90. N.J. Stats. Ann. §2C: 1-6.
91. First degree felonies are punishable by a maximum term of ten years in Pennsylvania. 18 Pa. C.S.A. §106(b)(3). The six offenses enumerated are arson, burglary, forgery, perjury, robbery and involuntary deviate sexual intercourse.
92. 18 Pa. C.S.A. §108; 42 Pa. C.S.A. §5552.
93. 42 Pa. C.S.A. §5501.
94. Comment, Model Penal Code, Tent. Draft No. 5, §1.07, p. 17.
95. Model Penal Code, §1.07(3).
96. New York Criminal Procedure Law, §30.10.
97. Practice Commentary, McKinney's Consol. Laws of N.Y., Ann. CPL §30.10.
98. 87 Misc. 2d 471, 384 N.Y.S. 2d 673 (1967).
99. 384 N.Y.S. 2d at 676.
100. 18 Pa. C.S.A. §108 (1972).
101. 42 Pa. C.S.A. §5552 (1978).
102. Comment, Model Penal Code, Tent. Draft No. 5, §1.07 at p. 22.

103. 18 Pa. C.S.A. §3105 (1972).
104. Comm. v. Shade, 363 A.2d 1187 (1976).
105. 18 Pa. C.S.A. §3105 (1976), Comm. v. Shade, 363 A.2d at 1191 (1976).
106. See People v. Swinney, 46 Cal. App. 3d 332, 120 Cal. Rptr. 148 (1975).
107. Comment Model Penal Code, Tent. Draft No. 5, §1.07, p. 16.
108. Ibid.
109. See Note 40, supra.
110. Comment, Model Penal Code, Tent. Draft No. 5, §1.07, pp. 24-26.
111. Ex Parte Vice, 5 Cal. App. 153 (1907).
112. Donnell v. United States, 229 F.2d 560 (1956); Taylor v. State, 292 N.W. 233 (Neb. 1940); State v. Williams, 69 A.2d 299 (Del. 1949); People v. Guariglia, 65 N.Y.S. 2d 96 (1946); Anno., 124 A.L.R. 1049 (1940).
113. See Note 40, supra.
114. Comment, Model Penal Code, Tent. Draft No. 5, §1.07, 27-28.
115. Cf. Bradley v. United States, 410 U.S. 605 (1973); Warden v. Marrero, 417 U.S. 653 (1974).
116. 23 F.2d 420 (2nd Cir. 1928), cert. den. 277 U.S. 590 (1928).
117. 28 Cal. App. 3d 846, 106 Cal. Rptr. 516 (1972).
118. 28 Cal. App. 3d at 85.
119. 43 Cal. App. 3d 253, 117 Cal. Rptr. 772 (1974).
120. Accord, People v. Swinney, 46 Cal. App. 3d 332, 120 Cal. Rptr. 148 (1975).

APPENDIX I  
CURRENT CALIFORNIA  
STATUTES OF LIMITATIONS

California felonies presently fall into one of four categories with respect to the Statute of Limitations. The date each offense was added to a particular category is indicated in parentheses.

- A. No Limitation - P.C. §799  
P.C. §187 - Murder (1872)  
P.C. §424 - Embezzlement of Public Moneys (1891)  
Gov.C. §6200,01- Falsification of Public Records (1891)  
P.C. §209 - Kidnapping (1970)
- B. Six Years After Commission of Crime - P.C. §800(b)  
P.C. §§68, 85, 93, 165;  
Elec.C. §29160- Acceptance of bribe by public Official (1941)  
P.C. §261 - Rape (1981)  
P.C. §264.1 - Rape Acting in Concert (1981)  
P.C. §286(c) - Sodomy by force or with Person under 14 (1981)  
P.C. §286(d) - Sodomy Acting in Concert (1981)  
P.C. §286(f) - Sodomy with Unconscious Victim (1981)  
P.C. §288 - Lewd Acts with Person under 14 (1981)  
P.C. §288a(c) - Oral Copulation by force or with Person Under 14 (1981)  
P.C. §288a(d) - Oral Copulation Acting in Concert (1981)  
P.C. §288a(f) - Oral Copulation with Unconscious Victim (1981)  
P.C. §289 - Rape by foreign object (1981)
- C. Three Years After Discovery of Crime - P.C. §800(c)  
P.C. §487 - Grand Theft (1969)  
P.C. §470 - Forgery (1970)  
P.C. §192(1) - Voluntary Manslaughter (1971)  
P.C. §192(2) - Involuntary Manslaughter (1971)  
P.C. §72 - Fraudulent Claim Against Government (1972)  
P.C. §118 - Perjury (1972)  
P.C. §118a - False Affidavit (1972)  
Gov.C. §1090 - Conflict of Interest by Public Official (1972)  
Gov.C. §27443 - Conflict of Interest by Public Administrator (1972)  
P.C. §132 - Offering False Evidence (1975)  
P.C. §134 - Preparing False Evidence (1975)  
Corp.C. §25540- All violations of Corporate Securities Law (1978)  
Corp.C. §25541- Fraud in offer, purchase or sale of Securities (1978)  
Welf.&Inst.C §11483 - Welfare Fraud (1981)  
Welf.&Inst.C §14107 - Medi-Cal Fraud (1982)
- D. Three Years After Commission of Crime - P.C. §800(a)  
All felonies not specified above.

California misdemeanors are all subject to a Statute of Limitations of one year after commission. P.C. §801(a). If an offense may be punished as either a felony or a misdemeanor, the felony Statute of Limitations applies. P.C. §801(b).

APPENDIX II

CRIMINAL STATUTES OF LIMITATIONS IN THE UNITED STATES

(Changes Since 1954 Are Reflected in Parentheses)

	Treason	Murder (1st Degree)	Arson	Rape	Burglary	Forgery	Robbery	Kidnapping	Embezzlement	Bribery <sup>e</sup>	Perjury	Conspiracy <sup>g</sup>	Misdemeanors <sup>h</sup>
Alabama	0	0	0	0	0	0	0	0	5 <sup>b</sup> or 1 or 1c	3	3	1	1 or 60 days
Alaska	(5)	(0)	(5)	(5)	(5)	(3)	(5)	(5)	(5)	(5)	(5)	(5)	1
Arizona	5(7)	0	5(7)	5(7)	5(7)	5(7)	5(7)	5(7)	5 or 1c	5 or 1(7)	5(7)	5(7)	1
Arkansas	0	0	3	0	3	3	3	3	3 or 1c	3 or 1	3 or 1a	3	1
California	3	0	3	3(6)	3	3	3	3(0)	3 or 1c	3 or 1	3	3 or 1	1
Colorado	1(0)	0	3	3	3	3	3	0 or 1 <sup>a</sup>	3 or 1 <sup>c</sup>	3 or 1 <sup>b</sup> (6)	3	3 or 1 <sup>b</sup>	1 <sup>b</sup>
Connecticut	5	0	5	5	5	5	5	5	5 or 1	5	5	5	1
Delaware	3(5)	0	2(5)	3(5)	2(5)	2(5)	2(5)	3 or 2a(5)	2(5)	2(5)	2(5)	2(5)	2(2 or 3)
Florida	2(3)	0	2(3)	0	2(3)	2(3)	2(3)	2(4)	2(3)	2(3)	2(3)	2(3)	2(2 or 3)
Georgia	7	0	4	4	4	4	7 or 4a	4	4	4	7 or 4c	4	2
Hawaii	(0)	(0)	(3)	(6)	(3)	(3)	(6)	(6)	(3)	(3)	(3)	(3)	(2)
Idaho	3	0	3	3	3	3	3	3	3 or 1c	3 or 1	3	3	1
Illinois	3(0)	0	0	3	3	3	3	3	3 or 1 <sup>c</sup>	3 or 1 <sup>b</sup>	3	3 or 1 <sup>b</sup>	1 <sup>b</sup> (6 mo.)
Indiana	0	0	0(5)	5	5	5	5	5	5 or 2c sd	5 or 2	5	5 or 2	2
Iowa	3	0	3	1 <sup>b</sup> (3)	3	3	3	3	3	3	3	3	2
Kansas	0	0	2	2	2	2	2	2	2	2	2	2	2 or 60 days
Kentucky	0	0	0	0	0	0	0	0	0	0	0	0	0
Louisiana	0	0	0 or 1a(6)	0 or 1a(6)	0 or 1a(6)	1(4)	0 or 1a(6)	0 or 1a(6)	1(4)	1(4)	1(4)	1(4)	1 or 6 mo.(2)
Maine	0	0	0(6)	6	6	6(4)	6	6	6	6	6	6	6
Maryland	0(6)	0	0(6)	0(6)	0(6)	0(6)	0(10)	0(6)	0 or 1d(6)	0(6)	0(6)	2(6)	1
Massachusetts	6	0	6	6	6	6	6(6 or 10)k	6	6	6	6	6	6
Michigan	6	0	6	6	6	6	6	6	6	6	6	6	6
Minnesota	3	0	3	3	3	3	3	3	3	3	3	3	3
Mississippi	2	0	0(2)	0(2)	0(2)	0(2)	0(2)	2(2)	0	2	2	2	2
Missouri	0	0	3	3	3	3	0 or 3a	3	3 or 1c	5	0 or 3f	1	1
Montana	5	0	5	5	5	5	5	5	5	5	5	5	5
Nebraska	0	0	4	3(0)	3	3	3	3	3 or 1 <sup>c</sup>	3	3	3 or 1 <sup>b</sup>	1 <sup>b</sup>
Nevada	3	0	4	4	4	4	4	4	3 or 1c	3 or 1	3 or 1a	3	1
New Hampshire	2(6)	0	0(6)	0(6)	0(6)	0(6)	0(6)	6	6	6	6	6	6
New Jersey	3(5)	0	5	5	5	5	5	0 or 5a(5)	5	5	5	5	5
New Mexico	3(5)	10(15)	3(5)	3(15)	3(5)	3(5)	3(15)	3	3 or 2c sd(5)	3 or 2(5)	3(5)	3 or 2(5)	2
New York	5	0	5(0)	5	5	5	5	5	5	5 or 2	5 or 2a	5 or 2	2
North Carolina	0	0	0	0	0	0	0	0	0	0	0	0	0
North Dakota	3	0	3	3	3	3	3	3	3	3	3	3	3
Ohio	0(6)	0	0(6)	0(6)	0(6)	0(6)	0(6)	0(6)	3(6)	3 or 0(6)	0(6)	0(6)	1(2)
Oklahoma	3	0	3	3	3	3	3	3	3	3	3	3	3
Oregon	3	0	3	3	3	3	3	3	3 or 2c	3 or 2	3	3 or 2	2
Pennsylvania	5	0	5	2(5)	5	5	5	2(5)	2	3(0)	3(0)	3(0)	3(2)
Rhode Island	0	0	0	0	0	0	0	3(0)	0	0	0	0	0
South Carolina	0	0	0	0	0	0	0	0	0	0	0	0	0
South Dakota	3(0)	0	3(0)	3(7)	3(7)	3(7)	3(7)	3(0)	10 or 3b(7)	3(7)	3(7)	3	3(7)
Tennessee	4	0	4	4	4	4	4	4	4 or 2c	2(4)	4 or 2f	4 or 2 or 1	1 or 6 mo.
Texas	20(3)	0	5	1(3)	5	10(3)	5	3	10 or 3d(3)	3	3	3	2
Utah	4	0	4	4	4	4	4	4	0 or 4b	4 or 3	4 or 3a	3(4)	3(2)
Vermont	0	0	0	0	0	0	0	0	6 or 3c	3	3	3	3
Virginia	0	0	0	0	0	0	0	0	0	0	0	0	5 or 2 or 1
Washington	3	0	0 or 3a	3	3	3	3	3	10 or 3d(3)	10 or 3(3)	10 or 3d(3)	10 or 3(3)	1
West Virginia	0	0	0	0	0	0	0	0	0	0	0	0	3 or 1(1)
Wisconsin	6	0	6	6	6	6	6	6	11j or 6d	6	6	6	3
Wyoming	0	0	0	0	0	0	0	0	0	0	0	0	0

a The shorter period is provided for the non-aggravated degree of the crime.  
 b The longer period applies if the monies taken were public monies.  
 c The difference is dependent upon the amount of money taken.  
 d The difference is dependent upon the capacity in which the offender served at the time of the commission of the crime.  
 e The difference is dependent upon the capacity which the person bribed occupied at the time of the bribery.  
 f The difference is dependent upon the nature of the proceeding in which the perjury occurred.  
 g The difference is dependent upon the object of the conspiracy.  
 h The difference is dependent upon the punishment for the particular offense.  
 i The period runs from the date of the discovery of the crime.  
 j The embezzlement within this longer provision can be prosecuted within 1 year after discovery; but the total period is not to be extended more than five years after the regular six year period has run.  
 k The longer period applies if the robbery is accomplished with weapon or threat of harm.

APPENDIX III

<u>CRIME</u>	<u>CURRENT</u> <u>S/L</u>	<u>TOO SHORT(%)</u>			<u>TOO LONG(%)</u>		
		<u>P</u>	<u>D</u>	<u>J</u>	<u>P</u>	<u>D</u>	<u>J</u>
ARSON	3	44	4	28	0	4	0
PAYMENT OF BRIBE	3	52	8	42	0	8	0
RECEIPT OF BRIBE	6	16	12	28	16	32	28
BURGLARY	3	36	0	0	0	8	0
CHILD MOLESTING <sup>1</sup>	6 <sup>1</sup>	-	-	-	-	-	-
CONFLICT OF INTEREST	3 <sup>3</sup>	24	0	0	4	8	0
COUNTERFEITING	3	24	0	14	0	8	0
CONSPIRACY	3	36	0	56	0	12	0
EMBEZZLEMENT OF PUBLIC FUNDS	0	8	0	0	24	48	0
FALSIFYING PUBLIC RECORDS	0	4	0	0	24	48	0
FRAUDULENT CLAIMS AGAINST GOVERNMENT	3 <sup>3</sup>	20	4	14	0	8	0
FORGERY	3	24	0	0	0	8	0
GRAND THEFT <sup>2</sup>	3 <sup>3</sup>	40	0	14	0	12	0
KIDNAPPING	0	0	0	0	4	52	0
MURDER	0	0	0	0	0	20	0
MANSLAUGHTER-VOL.	3 <sup>3</sup>	48	8	14	0	4	0
MANSLAUGHTER-INVOL.	3 <sup>3</sup>	44	8	0	0	4	0
MAYHEM	3	36	8	0	0	8	0
PERJURY	3 <sup>3</sup>	20	4	14	0	8	0
RAPE	6	36	8	0	8	48	14
FORCIBLE SODOMY/ ORAL COPULATION	6	36	8	0	8	52	14
ROBBERY	3	56	8	0	0	8	0
CORPORATE SECURITIES FRAUD	3 <sup>3</sup>	24	4	28	0	4	0
SALE OF NARCOTICS	3	24	0	0	0	24	0

<sup>1</sup>On the questionnaire circulated, the statute of limitations for child molesting was erroneously listed as 3 years, thus invalidating the results for this item on the survey.

<sup>2</sup>Grand Theft includes Embezzlement of private funds, False Pretenses and Larceny. See Cal.Pen.Code § 484.

<sup>3</sup>Statute of limitations commences to run three years after discovery of crime.

APPENDIX IV  
PROPOSED DRAFT

California Penal Code §800  
Time Limitations

- (1) A prosecution for an offense punishable by death (life imprisonment) may be commenced at any time.
- (2) Prosecutions for other offenses are subject to the following periods of limitation:
  - (a) A prosecution for an offense punishable by imprisonment in the state prison for nine (eight) years or more must be commenced within six years after it is committed.
  - (b) A prosecution for any other felony must be commenced within three years after it is committed.
- (3) Even if the period prescribed in subsection (2) has expired:
  - (a) A prosecution for any offense a material element of which is either fraud or a breach of fiduciary obligation may be commenced within one year after discovery of the offense by an aggrieved party or by a person who has legal capacity to represent an aggrieved party or a legal duty to report such offense and who is himself not a party to the offense, but in no case shall this provision extend the period of limitation otherwise applicable by more than three years.

- (b) A prosecution for any offense based upon misconduct in office by a public officer, employee or appointee may be commenced within one year after termination of the defendant's service in such office or within one year after discovery of the offense by a person having a duty to report such offense and who is himself not a party to the offense, but in no case shall this provision extend the period of limitation otherwise applicable by more than three years.
- (4) No prosecution for (any offense a material element of which is lack of consent by the victim)(any violation of Sections 261, 286, 288a or 289 of the Penal Code) may be commenced unless the offense was brought to the notice of public authority by complaint or otherwise within 6 months after its commission (or discovery) or, where the victim was less than 16 years old or otherwise incompetent to make complaint, within 6 months after a parent, guardian or other competent person specially interested in the victim, learns of the offense.
- (5) A prosecution is commenced either when an indictment is found or when an arrest warrant is issued provided that such warrant is executed without unreasonable delay.

- (6) The period of limitation does not run:
- (a) during any time when the accused, with a purpose to avoid detection, apprehension or prosecution, is outside the state or is absent from his usual place of abode within the state, but in no case shall this provision extend the period of limitation otherwise applicable by more than three years; or
  - (b) during any time when a prosecution against the accused for the same conduct is pending in this state.